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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, Partners doing business as VANCE DAIRY,

Petitioners,

—*v.*—

ORVILLE FREEMAN, Secretary of Agriculture of the United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WITH APPENDIX

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. B. Vance and Ford Vance, Partners doing business as Vance Dairy pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on the 19th day of June, 1963, at No. 18,731 below. Rehearing denied December 18, 1963.

I. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE COURTS BELOW

The opinion in the Fifth Circuit Court on denial of the motion for rehearing is not yet reported, but is set forth in Appendix I, page 120a.

The opinion in the Fifth Circuit Court reversing the Southern District of Mississippi District Court is reported at 319 F (2) 841, and set forth in Appendix H, page 119a. The opinion of the District Court does not appear to be reported, but is set forth in Appendix F, page 107a. The memorandum letter of the Fifth Circuit Court referring to the decision of this Court in *Lehigh Valley Coop., Inc.* v. *Freeman,* 370 U. S. 76, is attached hereto in Appendix G, page 117a.

II. THE GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254 (1), 62 Stat. 928.

The Judgment and Mandate below were made and entered on January 9, 1964. The decision denying the petition for rehearing was made and entered December 18, 1963.

No order extending the time to petition for certiorari has been made.

III. QUESTIONS PRESENTED FOR REVIEW

A. Vance Brothers, Mississippi Dairy farmers, produce, and bottle fluid milk on their own Mississippi farm, and carry it in their own trucks 7 miles to Hattiesburg Mississippi, and to other accessible Mississippi towns where they sell it to retail stores and households.

The Secretary of Agriculture, as he has in all other milk markets of the United States, affirmatively determined that payments to the Federal Milk Order program, are not required on such milk. (R. Vol. I, page 78)

Does the law permit the Secretary of Agriculture thereafter to impose on these farmers hundreds of dollars of penalty each month, assessed against and calculated on the very farm-produced milk which the Secretary found did not affect his Order, simply because they buy some needed extra milk for their customers from milk handlers who are regulated by and observe the pooled price requirements of the Secretary of Agriculture?

B. Is the imposition of these penalties a step which "embodies what the Commerce Clause was meant to end," which imposes a barrier in the way of free flow of fluid milk, a flow which the Congress did not intend to impede by Section 8c (5) (G) of the Act?

C. Did the Congress by Section 8c (5) (G) (Appendix A, page 5a, 7 USC 608c (13) (B)) of the Act intend to forbid the Secretary of Agriculture to penalize the otherwise unregulated home-farm milk of Vance Brothers on account of the purchase of pool milk for resale, calculating the amount of the penalty on the amount of Vance Brothers' farm production of milk, a procedure similar to that held forbidden by Section 8c (5) (G) in *Lehigh Valley Coop. v. United States*, 370 U. S. 76 (1962); see especially page 91 thereof?

D. The Fifth Circuit Court of Appeals has found that Vance Brothers were engaged intrastate commerce only. The Secretary administers the milk regulatory program through an agent designated pursuant to statutory authority (8c (7) (D) 7 USC 608c (7) (D)). This agent is called the Market Administrator. In view of this the question is:

1. Did Congress intend and does the 10th Amendment to the Constitution allow assessments to be made against

Vance's intrastate commerce without findings by the Secretary of Agriculture as to its alleged effect upon the fixed price set by the Secretary under the program, nor the extent of its effect upon the program, and in face of testimony of the Secretary's agent, the Market Administrator, of the Order that no evidence of the numbers of farmers who purchased needed milk from the Federally regulated plants or the volumes of those purchases was prepared because the amount of those purchases by farmers was inconsequential (R. Vol. I, page 307-8)?

E. Section 8c 13 (B) (7 USC 608c 13 (B)) prohibits the Secretary of agriculture from regulating a milk farmer. Section 8c 7 (D) 7 USC 608c 7 (D) forbids the exercise of incidental and necessary powers where they are inconsistent with the Act. The Act does not directly authorize the Secretary to forbid purchases of needed milk by farmers, nor does it directly authorize him to lay down prohibited activities, on farmers who distribute their milk direct to consumers.

From 1937 to 1957, the Secretary affirmatively determined that farmers like Vance Bros., could engage in normal commercial activities and still remain free of assessments on their home farm milk.

In 1957 the Secretary commenced restricting permissible commercial activity, and now in two markets prohibits any purchases of needed milk from regulated plants, and in twelve markets these purchases are greatly circumscribed in amount. (Appendix K page 121a, 124a)

In two markets, utilizing the power sought to be sanctioned herein, he has provided for assessments upon farmers who bought or sold cows, barns, or milking parlors

where cows are milked, except at acceptable times and on acceptable notice. (Appendix K page 121a, 124a)

The Secretary recognizes no limit on his power to conceive of new and more vexing prohibitions, even if, in fact, these operate to regulate directly the farm operation, affect the farm financial structure and restrain trade.

Therefore, the question is:

1. In view of the absence of express statutory direction from Congress to the Secretary to exercise the power he claims, and in view of the prohibitions Congress placed on the Secretary forbidding him to regulate a farmer, or to interfere with the free flow of milk, and the prohibition on the exercise of necessary and incidental powers in a way inconsistent with the Act, did Congress intend that the Secretary exercise the broad power he claims?

2. If Congress be deemed to have granted the Secretary such power, has Congress set forth sufficient standards to guide the exercise of its delegated power, in this particular?

F. Section 8c (5) (A) (7 USC 608c (5) (A), Appendix A page 32a) of the Act gives the Secretary authority to regulate only those milk handlers who "purchase" milk from producers.

Vance Brothers' farm to market operation is a single unified economic and legal unit. They milk the milk produced on their farm and do not buy that milk. No contract of purchase or outside entity of any type is involved in the movement of the home-farm milk from farm to consumer.

Vance Brothers first fully own, control or possess the milk which is subjected to the penalty assessments, at the moment the milk comes into being in the cows udder.

In view of the foregoing, the question is:

Does the production of the milk on Vance Brothers' farm constitute a "purchase" as defined in Section 8c (5) (A).

G. The Administrative Procedure Act requires that the Order be based upon substantial, *reliable* and probative evidence. (5 USC 1006, Appendix, page 8a). In the administrative proceeding Vance Brothers alleged in their petition that the Order was not promulgated on reliable testimony, but reliance was placed on the opinion testimony of trade rivals. These trade rivals were not interested in the stability of the Secretary's fixed price but were intent upon restraining trade and creating a monopoly and were interested in placing Vance Brothers between two fires so that Vance Brothers would lose needed milk, be unable to serve their existing customers, and rendered unable to service new customers in the first instance without substantial additional capital investment in additional barns and cows, thus placing a trade restraint in the way of their growth and would be placed at a trade disadvantage.

In view of the foregoing the question is:

Did the Secretary err in refusing to admit the offered testimony into evidence in the administrative review proceedings?

IV. THE STATUTE AND ORDER INVOLVED

The Statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 USC Sec. 601 et seq. This Act amended the Agricultural Adjustment Act of 1935, 49 Stat. 750. Provisions essential to this case are set forth in the Appendix hereto at Appendix A, commencing at page 1a. The Administrative Order involved herein is a Federal Milk Order covering Central Mississippi, which was known as No. 87, (7 CFR 987) at the time of the amendment contested herein, but which was renumbered for purposes of administrative convenience on January 1, 1963, as No. 103 (7 CFR 1103 et seq.). The Order prior to amendment is set forth in full in Appendix B-2, page 47a, and the present order containing the contested amendment is set forth in full in Appendix B-1, commencing at page 9a. The Constitutional provision involved is the 10th Amendment.

V. STATEMENT OF THE CASE

The original jurisdiction of the District Court is set forth at 7 USC Section 608c 15 (B).

The Federal Milk Marketing Order involved herein governs certain counties all within the State of Mississippi, and is known as the Central Mississippi Order.

During all relevant periods of time and prior to the amended Order complained of herein, Vance Brothers produced milk from cows owned by them, quartered on farm land owned by them and located 7 miles north of Hattiesburg, Mississippi.

The milk was taken from cows in a milking barn also physically situated on the farm. The milk was then moved

by Vance Brothers a distance of 350 feet to a bottling plant also physically located on their farm, and solely owned by them (R. Vol. 1, pages 90, 98, Exhibit 9 of this proceeding, which is a photograph of the farm and buildings and showing the farm houses of the petitioners in proximal relation to the other buildings).

Vance Brothers pasteurize their milk at their plant, bottle it for store and household fluid milk sales and transport it in their own trucks 7 miles to Hattiesburg, Mississippi where it is chiefly sold. The balance is sold in other Mississippi towns only. All sales are to stores or households. No milk produced on the farm is sold in any other way.

The Vance Brothers farm, and the City of Hattiesburg, Mississippi and all other relevant sales points are located within Counties of the State of Mississippi, in which the minimum price of the sale of raw milk by farmers to dealers is regulated by the Secretary of Agriculture, pursuant to the Agricultural Adjustment Act of 1937 as amended. These prices are fixed by orders of the Secretary of Agriculture.

The Order plan of this Order follows those in effect in many other Federal Order areas, and is similar to that described in the Lehigh Valley case.

In this order the Secretary fixes the minimum price to be paid to farmers selling raw milk to dealers, by pricing milk sold in fluid form at $2.16 over manufacturing prices in Minnesota and Wisconsin, which he calls the Class I price, and by pricing milk sold for consumption in solid farm, i. e, butter and cheese at the prices paid for milk purchased for such uses by Borden's, Pet Milk, and Carnation Milk at Mississippi plants, which he calls Class II.

The actual sales whether for fluid or manufacturing uses are reported monthly to the Secretary's agent the Market Administrator by the dealers who actually bought raw milk from farmers. These reports when totaled indicate the amount of area milk actually sold for household purposes and the amount sold for all other uses, chiefly manufacturing.

The volume of milk actually sold for class I purposes is multiplied by the class price and the same is done for class II sales and prices. The resulting dollars of each class are added together and the total divided by the total amount of raw unprocessed milk bought by milk dealers from farmers in that month. The resulting dollar figure is called the blend, and is a blend of the two classes and the values assigned to them.

This blend then becomes the fixed minimum price, which the Secretary requires to be paid to farmers who sold milk to dealers during that period of time.

Since the large manufacturing dealers who purchase milk will be required to pay farmers from whom they bought the milk more than the Secretary has determined to be the reasonable value of the milk, the Secretary requires that the dealers who sold milk valued at more than his fixed price, contribute monies which are then paid in the main to the large manufacturing dealers.

In more simple terms than milk, and in the framework of the legal profession, one could assume, that upon admission to the bar all lawyers have the same minimum ability, but that some lawyers are engaged in more remunerative work than others. The various State Bar Associations would be directed and authorized to assess the more suc-

cessful practitioners engaged in the more remunerative business an amount equal to the difference between the extent to which they had elevated their income from the average of those of their brethren, and would require that that money be distributed to those of their brethren who had not been retained to perform the more remunerative work, and whose incomes accordingly fell below the average.

By the terms of the Order, prior to the Amendment of April, 1957, at all times Vance Brothers' home farm production was not regulated. This result in terms of Order mechanics was achieved by an interrelationship of the definitions of the Order, which ultimately resulted in the classification of the plant operated by the Vance Brothers as a non-pool plant. [1/]

By virtue of the amendment of April 1957 the mechanical classes set forth in the definitions remained the same, but the terms of one definition was altered so that the Vance Brothers would ultimately lose their classification as a non-pool plant supplying the non-pool milk, and would become a regulated plant, or in the language of the Order a "pool-plant", in the event that Vance Brothers continued to perform a commercial transaction then necessary to the continuance of their business and the service of their customers, i.e.: the purchase of additional needed milk from a regulated plant.

[1/] By the terms of the Order prior to April 1957, Vance Brothers operated a non-pool plant not subject to regulation, by reason of the fact they processed and sold directly to the public the milk they produced on their own farm. A farmer who produced and processed his own milk and who bought milk from a pool plant was called a producer-handler (7 CFR 987.16, set forth at Appendix B-2, page 51a). These plants were excluded from the definition of pool plants (7 CFR 987.9, Appendix B-2, page 149a), and included in the definition of non-pool plants (7 CFR 987.10, Appendix B-2, page 49a).

However by the terms of the amended Order, April 1, 1957, the milk produced on the Vance Brothers' farm and processed and sold in Hattiesburg, Mississippi, remained non-pool milk.[2] The findings on which the Order was based found that these activities were not "disruptive" of the regulatory program (22 FR 1589, R. Vol. 1, page 78; see also R. Vol. 2 page 303, exhibit 4 which lists Vance Bros. as one of the class of those referred to.)

The purchases of Vance Brothers of bulk milk from East Central Dairy were not expressly prohibited in so many words by the amended Order, but upon continuing to purchase so much as one quart of milk from East Central Dairy or any other pool handler, Vance Brothers were assessed as pool handlers upon all of what would otherwise be the non-pool milk produced on their own farm at the be the non-pool milk produced on their own farm.[3]

On account of the Vance Brothers purchases of milk from East Central Dairy, the Market Administrator billed Vance Brothers several hundred dollars per month in a series of bills now totaling several thousand dollars, computed upon the volume of the otherwise "non-pool milk" of Vance Brothers times the monetary difference between the Class 1 price and the Order blend price, and without regard to the actual cost of the production of that milk.

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[2] The amendment continued the definitions of pool and non-pool plants, set forth in footnote 1, and included as a non-pool plant, the plant of a producer-handler who did not buy any milk from anyone. The present provisions of the Order reflecting this amendment are set forth at Appendix B-1 page 13a; 7 CFR 1103.16.

[3] The method of computing the penalty is set forth at 7 CFR 1103.97, Appendix B-1, page 42a. This section requires payments at the difference between the Class I price and the blend.

Vance Brothers paid these bills and filed a verified petition with the Secretary of Agriculture seeking a determination that the amended Order was illegally promulgated and that it was based upon testimony of large trade rivals who desired their customers, and who sought to monopolize commerce and force them out of business, and alleging that the bills exceeded the net profit of the business (R Vol. 1 page 26). The matter came on for a hearing before the hearing examiner who refused to admit into evidence petitioners' proof on the attempt by their competitors to formulate testimony for the purpose of forcing them out of business and monopolizing commerce. The hearing examiner recommended a decision denying relief (Appendix C, page 81a) to which the petitioners filed exception (Appendix D, page 93a). The Judicial Officer of the Department of Agriculture, acting for the Secretary of Agriculture, upheld the Hearing Examiner and denied relief (Appendix E, page 96a). Thereafter, on the 24th day of June 1959, petitioners filed their complaint for review in the District Court of their residence, that is the Southern District Court of Mississippi. Answer was made and each party moved for Summary Judgment. The Distict Court granted the petitioners' motion for Summary Judgment, upheld the complaint and ruled that the petitioners were regulated in violation of 7 USC 608c 13 B, which forbids the regulation of farmers and that milk produced on the farm is not "purchased" milk. (The opinion is set forth Appendix F, page 107a). An appeal to the United States Circuit Court for the Fifth Circuit was filed by the Secretary of Agriculture and a three Judge Circuit Court panel after first attempting to dispose of the case on the basis of the *Lehigh Valley Cooperative* v. *Freeman*, 370 U. S. 76 82 S. Ct. 1168 (See Appendix G page 117a a letter from the Court Clerk to counsel, sent at the direction of the panel.) unanimously reversed the District Court of the

Southern District of Mississippi (Appendix H, page 119a). Rehearing was denied after an extension of time on December 18, 1963, (Appendix 1, page 120a). The motion for a full hearing by the full panel was not referred to the full panel or any member thereof by the three judges, and according to the Rules of the Fifth Circuit, thus failed to be granted.

VI. REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *LEHIGH VALLEY COOPERATIVE FARMERS, INC.* v. *UNITED STATES* 370 U. S. 76, AND WITH THE GENERAL POLICY OF THE FREE FLOW OF GOODS IN COMMERCE.

The *Lehigh Valley* case was sub judice in this Court during the pendency of the instant Vance case in the Fifth Circuit Court of Appeals. The Supreme Court decided Lehigh on June 4, 1962 and held that the act forbade the Secretary to impede the free flow of milk.

After this Court's decision in the *Lehigh* case counsel for Vance Brothers received from the Circuit Court Clerk, then acting at the request of the Circuit Court panel, the letter attached as Appendix G, page 117a. This letter appears to indicate that the Circuit Court believed that the Lehigh decision disposed of the instant case. However, in the subsequent decision denying relief herein made no reliance was placed upon the Lehigh Valley case (Appendix H, page 119a). This omission was brought to the attention of the Circuit Court of Appeals on the Motion for Rehearing herein and the Court wtihout discussion or analysis of the issue held that the contested provision was not a trade barrier in violation of Section 8c (5) (G) as that section was construed in the Lehigh Valley decision.

From this it is, therefore, difficult to know exactly how the Circuit Court interpreted and applied the Lehigh Valley decision.

It appears that the Fifth Circuit Court of Appeals believes that in Lehigh, the Supreme Court was not construing the general meaning of Section 8c (5) (G), and its prohibitions; that the Secretary in the view of the Fifth Circuit Court of Appeals is free to establish trade barriers, if they are not of the precisely identical sort described in the language in the Lehigh case.

Whatever doubt may exist as to the Fifth Circuit's interpretation, the Secretary maintained in the Fifth Circuit Court of Appeals in the instant case that the prohibitions of Section 8c (5) (G) apply only to 8c. 7 (D) and do not apply to 8c (5) (A) where the issue is the exercise of the Secretary's authority to fully regulate. In the Secretary's view, the Lehigh case prohibits trade barriers only when they are placed on partially regulated dealers. In the view of the Secretary, the Lehigh case does not restrict his ability to eliminate the problems of partial regulation, by imposing full regulation on the occurrence of certain acts, whatever the consequences. It is fair to say that the Secretary seeks to do indirectly under 8c (5) (A), what he cannot do directly under 8c (7) (D). It is a fair inference that this position was sanctioned by the Fifth Circuit Court of Appeals.

The District Court of Delaware placed a different construction on the Lehigh decision (*Lewes Dairy* v. *Freeman*, CA 2353 opinion unreported, but attached herein at Appendix L, page 125a, now on appeal to the Third Circuit as case # 14,643). On its facts the Lewes Dairy case involved a partially regulated handler who was placed under full regulation, 8c 5 (A), when his sales in the marketing

area exceeded 10%, to what the Court felt was his competitive disadvantage. The District Court held that the Lehigh case had interpreted 8c (5) (G) to prohibit "any form of trade barrier".

The legal basis of the Lewes case is squarely against the instant case. One or the other interpretation must prevail.

The Lehigh case recognized that the election between remaining partially regulated, and becoming fully regulated was a compulsive and non-voluntary, election, and constituted the exaction of tribute for the benefit of the marketing program. The dilemma on which the Vance Brothers are hung is in fact further evidence of the trade barrier and not an answer to the Secretary's authority, since Vance Brothers would be required to fail to serve some of their customers or pay tribute, because the Secretary has found in this case that the production, processing and sale of his milk by a farmer is not regulated because it is not disruptive. Yet it is this very non-pool, non-disruptive milk which is assessed, for the act of purchase of milk from East Central Dairies.

Payments required to be made upon such milk, whether prompted by competitors intent on monopoly or not, must operate to subsidize the marketing pool and are in fact a tribute, of the nature condemned in Lehigh.

If the Lehigh Valley case (Supra) is to be deemed to have broadly construed the meaning of Section 8c (5) (G), and if that prohibition is to apply to all terms in an Order and not just to those dealing with compensatory payments, then it seems that this barrier to trade must fall.

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION, IN *UNITED STATES, ET AL* v. *CHICAGO M. St. T. & P. R. Co.*, 294 U. S. 499, (1935), 55 S. Ct. 462, at 466, AND SUBSTANTIALLY REMOVES THE SECRETARY FROM ANY EFFECTIVE JUDICIAL SUPERVISION, ALLOWS HIM TO DETERMINE THE BOUNDS OF HIS OWN JURISDICTION AND THE MERITORIOUSNESS OF HIS OWN DECISIONS, CONTRARY TO THE INTENT OF CONGRESS. THIS RAISES AN IMPORTANT FEDERAL QUESTION.

In the instant Vance Brothers case the decision of the Fifth Circuit Court of Appeals held that the Secretary's finding of a "disruption" by virtue of the purchases from East Central Dairy, was by itself sufficient, even though the Secretary made no findings as to the *extent* of the alleged disruption or its *impact*, if any, upon the Secretary's fixed price.

This finding completely conflicts with findings made on similar facts in the Southern Michigan decision, where the Secretary found purchases by those similar to Vance Brothers reduced the surplus, of the regulatory program and were in the public interest (27 FR10795, 10797) and conflicts with the provisions of 69 other orders (See Appendix K, page121a).

The Circuit Courts holding conflicts in principle with the holding of the Supreme Court in *United States, et al* v. *Chicago M. St. T. & P. R. Co.*, 294 U. S. 499, 508 (1935), 55 S. Ct. 462, at 466, where dealing with the Interstate Commerce Commission, a price fixing agency as is the Secretary of Agriculture in this case, this court held that a finding of "disruption" is not sufficient by itself without further findings of the extent of the expected loss and an additional finding as to whether the impairment would be

trivial or substantial. This was held essential for the validity of the regulation and proper judicial supervision of the rate making process.

The Administrative Procedure Act, which was enacted subsequent to the Chicago case, indicates a Congressional intent that Chicago type findings be made. (Appendix A, page 8a).

The Secretary cannot rely upon his expertise to sustain jurisdiction, nor to sustain an order in which he has made no findings, even based upon expertise, as to the substantialness and extent of the alleged "disruption."[4]

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[4] The word "disruptive" cannot be relied upon per se. The record establishes an admitted fact that the milk purchased by Vance Brothers from East Central Dairy was regulated by the Secretary, and while under the Secretary's control at that dairy, was priced by the Secretary on account of the purchase by Vance Brothers, as if East Central Dairy and the regulatory program itself had sold the milk for household fluid milk purposes (i.e, at Class I prices), the highest and best return available under the regulatory system. (R. Vol. 2, page 353, see page 310 for identification of witness; see also 7 CFR 1103.44). The Secretary has found in other markets that purchases by farmers similarly situated to Vance Brothers reduce the surplus of the regulatory program and are in the public interest. (see 27 FR 10795, 10797). Such purchases by farmers similarly situated to Vance are allowed without the penalty involved herein in 69 of the 83 Federal Milk Orders, and in 12 other Orders such purchases are allowed up to quantitative limits; but these limits are deemed inadequate. The within finding is one of two such findings of the entire regulatory program of 83 milk orders. Since Vance Bros. paid Class I prices, that is the best order price for the needed milk, his cost as to that milk equals that of his competitors who pay Class I *for their milk* by paying the blend or fixed price to the farmer, and the difference between the blend and Class I to the market program, making a total cost to each of Class I.

Not only were these essential findings not made, they could not have been validly made, because there was no evidence in the promulgation hearing as to the number and volume of milk of farmers who process and distribute their own milk to the public, and who also bought milk from the Central Mississippi Order plants. The Market Administrator who is by law the agent of the Secretary testified that the numbers were less than three and the amount involved so small as to not be significant. (R. Vol. 1, page 307-8).

Further, the Circuit Court found that Vance's activities constituted intrastate commerce, and in order for the Secretary to regulate admittedly intrastate commerce he must affirmatively show as a basis for his jurisdiction that there is a substantial burden to interstate commerce (*Florida* v. *United States*, 282 U. S. 194).[5] There is inherent in the 10th Amendment a similar requirement.

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[5] In *Wickard v. Filburn*, 317 U. S. 111, this Court also found a *substantial negative* effect upon interstate commerce. The Court in *Hauf v. United States*, 235 F. (2) 710, at 718 also so interpreted the law, where after the citing of Wickard case the Court said:

> "This does not advance the proposition that Congress, apart from delegated powers, may enact measures governing local business. It may do so only when the local activity to be regulated *substantially affects* interstate commerce. See Manderville Island Farms v. American Crystal Sugar Co., 1948, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328."

In United States v. Wrightwood Dairy, 315 U.S. 110, this Court found a *substantial* interference with interstate commerce, on findings indicating large volumes of milk purchased from 70 farmers. That case did not involve a farmer who processed and distributed his farm milk, and bought and paid for needed extra milk at top order prices.

Congress in the enactment of the Agricultural Adjustment Act of 1937 was scrupulous in its creation of an area of intrastate regulation and by express amendment restricted the Secretary to regulating *only* that intrastate commerce which *substantially* burdened interstate commerce. (Section 8c (1), 7 USC 608c (1).) The House debates by Mr. Andresen, the author of Section 8c (5) (G) make it plain that a farmer processing and distributing his milk at a nearby city was intended to be free of regulation.[6] The Senate debates make it plain that the word "only" was inserted in the jurisdiction clause (7 USC 608c (1), Appendix A, page 1a) for the purpose requir-

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[6] Congressional Record Vol. 79, page 9479, exchange between the floor manager, Mr. Andresen, and Mr. Halleck.

"Mr. Halleck. Do I understand that under the proposed amendment the *issuance of orders will be limited solely to interstate commerce?*

"Mr. Andresen: Absolutely. *It does not affect intra state commerce.* If the gentleman is asked when he gets back home by his grocery merchant who sells milk, butter, and cheese, whether or not the merchant has to take out a license, he may tell him "no"; he does not have to take out a license and does not become subject to the Federal license issued by the Secretary of Agriculture. The *same thing would apply to the small milk dealer or a farmer who has a small herd of cattle and sells the milk to the people in the cities and villages in the district. He will not be subject to a license, because the license provisions, of order provisions, deal only with commodities that move in interstate commerce.*"

ing substantial intrastate interference before Federal regulation. [7]/

It may be argued in the future that the Secretary need not hold more than perfunctory hearings, if this order is sustained. Such a result was not intended by Congress, who were almost unanimous in the need to restrict the Secretary.

3. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE HOLDING OF THE NINTH CIRCUIT IN *ANGLO-CANADIAN SHIPPING CO., LTD.* v. *FEDERAL MARITIME COM'N*, 310 F.2d 606-617.

The primary evidence on which the finding of disruption could be based was opinion testimony given by the competitors of Vance and whom they allege are engaged in a conspiracy to monopolize commerce and eliminate them from the market place. This testimony stated that in their opinion the purchases from East Central Dairy were disruptive.

The Ninth Circuit in the case of *Anglo-Canadian Shipping Co., Ltd.* v. *Federal Maritime Com'n*, 310 F.2d 606, at page 617, struck down findings of the Federal Maritime Com-

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[7]/ (See also, 79 Congressional record part 8 page 11638, see also page 11639 where the following exchange occurred,

"Mr. Borah: The Senator will get himself into a great deal of trouble unless he defines the word affect.

"Mr. Smith: *In light of the Decision of the Supreme Court in the Schechter case* this will be interpreted to mean 'BURDEN, OBSTRUCT OR AFFECT TO SUCH AN EXTENT AS TO RENDER NULL AND VOID THE OPERATION OF INTERSTATE COMMERCE *whatever it is.*'" (Emphasis supplied).

mission based on evidence which was "mere expressions of opinion" and said "these could hardly form the basis for a finding." Yet the Fifth Circuit in the instant case has sustained a finding based on just such opinion evidence.

4. JUDGES HAVING DIFFERED THE MEANING OF THE WORD "PURCHASE" AT 8c (5) (A), WHICH IS THE DEFINITION ON WHICH REGULATION PIVOTS, SHOULD BE FINALLY CONSTRUED IN THE PUBLIC INTEREST.

The Supreme Court in the case of *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S., 533, 578-581, held that under the Agricultural Adjustment Act of 1937 as amended, a cooperative corporation, which owned *no farms*, and which engaged in a *contract* with their members in which the member agreed to deliver their milk to the cooperative and the cooperative *agreed to pay a price* based upon the amount received less expenses, and which *distributed its products through other business entities*, may be regulated by the Secretary under Section 8c (5) (A) of the Act, which allows regulation only of handlers who "purchase" milk from farmers, because that milk was "acquired for marketing," and the Cooperative owned no farms. [8]/

The Fifth Circuit in the instant Vance Brothers case adopted the decision of the Third Circuit in the case of *Ideal Farms, Inc. v. Benson*, 3 Cir. (1961), 288 F. 2d 608, dissent of Judge Hastie, at 619, Certiorari denied, 372 U. S. 965, that the construction of the word "purchase"

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[8]/ Section 8c (5) (C) also uses the word purchased. This Section provides for assessments against "purchased" milk. It does not authorize assessments against Vance Brothers home farm milk. In this case Vance Brothers did not buy milk from farmers.

by the Supreme Court in the Rock Royal case for purposes of allowing a cooperative which owned no farms to be regulated, could be expanded by the Circuits Courts to include the home-farm milk of a farmer owns farms and who never actually purchases that milk but owns the milk while it is still in the udder of the cow, where the Act forbids regulation (Section 8c (13) (B), 7 USC 608c (13) (B), Appendix A, page 5a), where no contract or a second entity is involved, and where the distribution is by the very entity which produced the milk.

This interpretation conflicts in principle with the construction placed on the same language by The Second Circuit Court of Appeals by Judge Hand in the case of *Dairymens League Cooperative Ass'n, Inc.* v. *Brannan*, 173 F. 2d 37, at page 62. [9]/

While the facts in the Dairymens League case are different, the meaning to be given the word "purchase" which is the chief regulatory word of the Act, appears in Judge Hand's view to be identical to that urged by Judge Hastie in his dissent in the Ideal Farms case and these are identical to the construction placed upon the word by Judge Mize in the instant Vance case.

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[9]/ "The plaintiff first argues that its delivery to its Newark 'plant' was a purchase, for which it relies upon a remark of Reed, J., in United States v. Rock Royal Co-Operative, Inc. that *'purchased' means 'acquired for marketing.'* That was said in discussing sales of milk by 'producers' to their cooperative, as to which the Act was explicit; *it was not intended as a general definition*, and to use it in interpreting III-D would unduly expand the court's meaning."

The Third and Fifth Circuits have extended the meaning of the word "purchase" beyond its logical base.

A definition so essential to the question of authority to regulate farmers like Vance Bros., and the lower Courts having relied heavily upon an expansion of a previous decision of this Court, not a firm holding, ought to be finally settled in the interests of all parties. Farmers in marketing areas in various parts of the United States are anxiously hoping for a ruling upon an issue so vital to the survival of their lifetime work, and to the management of their farms.

It is worthy of note that the Fourth Circuit in construing the meaning of the word "purchase" as utilized in the Agricultural Adjustment Act of 1938, 52 Stat 31, 43, 7 USC 1446c, applied the common and ordinary meaning of the word to the "purchase" of dairy commodities. (*Swift & Co.* v. *United States*, 257 F. 2d 787, 794 cert. denied, 358 U. S. 837, followed in *Kraft Foods Company of Wisconsin* v. *C. C. C.*, 7th Cir., 266 F. 2d 254 Cert. denied, 80 S. Ct. 83, 361 U. S. 832.)

CONCLUSION

The within Petition raises several issues involving the interpretation or application of at least three previous decisions by this Court, and involves the scope of the Secretary of Agriculture's jurisdiction, and the validity of the findings necessary for that jurisdiction, and raises important Federal questions which only the Supreme Court can

finally resolve in the interest of the public and the parties. Many farmers similar to Vance Bros. are unable to make common business decisions concerning capital investments until these issues are resolved.

Respectfully submitted,

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APPENDIX A.

Applicable Statutes

§ 608. Orders regulating handling of commodity —

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

Title 7 U. S. C. Sec. 610 (j):

"(j) The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce *usual* in the handling of the commodity or product whereby they,

or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where *purchase or sale* is either for shipment to another State for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of intestate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nations." (Emphasis supplied)

* * * * *

(3) Notice and hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order.

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditons thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613-619, 620, 623 and 624 of this title with respect to such commodity.

(5) Milk and its products; terms and conditions of orders. In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

(13) Retailer and producer exemption.

* * * * *

(B) No order issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title

shall be applicable to any producer in his capacity as a producer.

* * * * *

(17) Provisions applicable to amendments.

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided,* That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

(18 Milk prices.

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purpose of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix

such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

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§ 610. Administration. * * *

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(i) Cooperation with State authorities; imparting information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture; *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d(1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such au-

thorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d(2) of this title.

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§ 1006. *5 USC 1006,* 60 Stat. 241

HEARINGS; PRESIDING OFFICERS; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS FOR DECISION

"Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

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§ 1007. *5 USC 1007,* 60 Stat. 242

INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

"All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

APPENDIX B.

ORDER PROVISIONS

1 — Present Order Provisions

DEFINITIONS

§ 1103.1 Act.

"Act" means Public Act No. 10, 73d Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.).

§ 1103.2 Secretary.

"Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the United States authorized to exercise the powers or to perform the duties of the said Secretary of Agriculture.

§ 1103.3 Department of Agriculture.

"Department of Agriculture" means the United States Department of Agriculture or any other Federal agency authorized to perform the price reporting functions specified in this part.

§ 1103.4 Person.

"Person" means any individual, partnership, corporation, association, or other business unit.

§ 1103.5 Cooperative association.

"Cooperative association" means any cooperative marketing association which the Secretary determines, after application by the association:

(a) To be qualified under the provisions of the act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act"; and

(b) To have full authority in the sale of milk of its members and to be engaged in making collective sales of or marketing milk or its products for its members.

Appendix B. — Order Provisions
1 — Present Order Provisions

§ 1103.6 Central Mississippi marketing area.

"Central Mississippi marketing area," called the "marketing area" in this part, means all the territory within the following counties: Adams, Claiborne; Clarke, Copiah, Covington, Forrest, Franklin, Hinds, Jasper, Jefferson, Jefferson Davis, Jones, Lamar (except Beat 2 thereof), Lauderdale, Lawrence, Lincoln, Madison, Marion, Neshoba, Newton, Perry, Rankin, Scott, Simpson, Smith, Walthall, Warren, and Wayne, all in the State of Mississippi.

§ 1103.7 Distributing plant.

"Distributing plant" means an approved plant from which Class I milk equal to not less than 50 percent of its receipts of producer milk and fluid milk products from other pool plants is disposed of during the month, on routes or through plant stores, to wholesale or retail outlets (except pool plants) and from which not less than 20 percent of such Class I milk is disposed of during the month on routes or through plant stores, to wholesale or retail outlets (except pool plants) located in the marketing area.

§ 1103.8 Supply plant.

"Supply plant" means an approved plant from which during the month an amount equal to 50 percent or more of receipts of its producer milk is shipped to and received at distributing plants. Any supply plant that was a pool plant during each of the months of August through January immediately preceding shall be a pool plant each of the months of February through July unless written notice to the market administrator is received before the first day of the month of its intention to withdraw, in which case such plant shall thereafter be a nonpool plant, unless it again qualifies as a supply plant by shipping 50 percent or more of its receipts from dairy farmers to a plant described in § 1103.7

Appendix B. — Order Provisions
1 — Present Order Provisions

§ 1103.9 Pool plant.

"Pool plant" means either a distributing plant or a supply plant, except a plant operated by a producer-handler.

§ 1103.10 Nonpool plant.

"Nonpool plant" means any milk manufacturing or processing plant other than a pool plant.

§ 1103.11 Approved plant.

"Approved plant" means all of the buildings, premises and facilities of (a) a plant(s) in which milk or skim milk is processed or packaged and from which any fluid milk product is disposed of during the month on routes (including routes operated by vendors and sales through plant stores) to wholesale or retail outlets (except milk distributing or processing plants (located in the marketing area, or (b) from which milk or skim milk eligible for distribution in the marketing area under a Grade A label is shipped during the month to a distributing plant.

§ 1103.12 Handler.

"Handler" means:

(a) A cooperative association with respect to milk of producers diverted for the account of such association from a pool plant to a nonpool plant in accordance with the provisions of § 1103.14; or

(b) Any person in his capacity as the operator of one or more approved plants. [23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10336, Oct. 28, 1960]

§ 1103.13 Producer.

"Producer" means any person, other than a producer-handler, who produces milk in compliance with Grade A inspection requirements of a duly constituted health authority, which milk is received during the month at a pool plant

or is diverted pursuant to § 1103.14. (Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10336, Oct. 28, 1960]

§ 1103.14 Producer milk.

"Producer milk" means all skim milk and butterfat received at a pool plant directly from producers or which is diverted by a handler for the account of such handler, subject to the following conditions:

(a) The operator of a pool plant may divert the milk production of a producer to the pool plant of another handler for any number of days of the month;

(b) During December through August such a handler or a cooperative association may divert the milk production of a producer to a nonpool plant (except a nonpool plant which is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act) for any number of days of the month;

(c) During the months of September through November milk production of a producer may be diverted by a handler, from a pool plant to a nonpool plant (except a nonpool plant which is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act) as producer milk for a maximum of 10 days' production. Milk diverted in excess of 10 days' production of such a producer shall not be producer milk; and

(d) Milk diverted for the account of the operator of a pool plant shall be deemed to have been received at the plant from which diverted, and milk diverted for the account of a cooperative association shall be deemed to have been received by the cooperative association at the location of the pool plant from which it was diverted. (Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10336, Oct. 28, 1960]

Appendix B. — Order Provisions
1 — Present Order Provisions

§ 1103.15 Other source milk.

"Other source milk" means all skim milk and butterfat contained in: (a) Receipts during the month of fluid milk products except (1) fluid milk products received from pool plants, and (2) producer milk; and (b) products, other than fluid milk products, from any source (including those produced at the plant) which are reprocessed or converted to another product in the plant during the month.

§ 1103.16 Producer-handler.

"Producer-handler" means any person who operates a dairy farm and a distributing plant, which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant.

§ 1103.17 Chicago butter price.

"Chicago butter price" means the simple average, as computed by the market administrator of the daily wholesale selling prices (using the midpoint of any range as one price) per pound of 92-score bulk creamery butter at Chicago as reported during the month by the Department of Agriculture.

§ 1103.18 Fluid milk product.

"Fluid milk product" means all skim milk (including concentrated and reconstituted skim milk) and butterfat in the form of milk, skim milk, buttermilk, flavored milk, flavored milk drinks (including eggnog), yogurt, cream (other than frozen storage cream), cultured sour cream, and any mixture of cream and milk or skim milk (other than ice cream, ice cream mixes, frozen ice milk, ice milk mixes, frozen desserts and mixes, and sterilized products contained in hermetically sealed containers).

Appendix B. — Order Provisions
1 — Present Order Provisions

MARKET ADMINISTRATOR

§ 1103.20 Designation.

The agency for the administration of this part shall be a market administrator, selected by the Secretary, who shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

§ 1103.21 Powers.

The market administrator shall have the following powers with respect to this part:

(a) To administer its terms and provisions;

(b) To receive, investigate, and report to the Secretary, complaints of violations;

(c) To make rules and regulations to effectuate its terms and provisions; and

(d) To recommend amendments to the Secretary.

§ 1103.22 Duties.

The market administrator shall perform all duties necessary to administer the terms and provisions of this part, including, but not limited to, the following:

(a) Within 45 days following the date on which he enters upon his duties, or such lesser period as may be prescribed by the Secretary, execute and deliver to the Secretary a bond, effective as of the date on which he enters upon such duties and conditioned upon the faithful performance of such duties, in an amount and with surety thereon, satisfactory to the Secretary;

(b) Employ and fix the compensation of such persons as may be necessary to enable him to administer its terms and provisions;

(c) Obtain a bond in a reasonable amount and with reasonable surety thereon covering each employee who handles funds entrusted to the market administrator;

(d) Pay out of the funds provided by § 1103.95, the cost of his bond and of the bonds of his employees, his own compensation, and all other expenses, except those incurred under § 1103.94, necessarily incurred by him in the maintenance and functioning of his office and in the performance of his duties;

(e) Keep such books and records as will clearly reflect the transactions provided for in this part, and, upon request by the Secretary, surrender the same to such other person as the Secretary may designate;

(f) Submit his books and records to examination by the Secretary and furnish such information and reports as may be requested by the Secretary;

(g) Audit all reports and payments by each handler by inspection of such handler's records and of the records of any other handler or person upon whose utilization the classification of skim milk or butterfat for such handler depends;

(h) Publicly announce, at his discretion, unless otherwise directed by the Secretary, by posting in a conspicuous place in his office and by such other means as he deems appropriate, the name of any person who, after the date upon which he is required to perform such acts, has not made reports pursuant to §§ 1103.30 and 1103.31, or payments pursuant to § 1103.90, and §§ 1103.93 to 1103.98;

(i) Publicly announce, by posting in a conspicuous place in his office and by such other means as he deems appropriate, and notify each handler in writing:

(1) On or before the 6th day of each month, the minimum price for Class I milk computed pursuant to § 1103.51 (a) and the Class I butterfat differential computed pursuant to § 1103.52(a), both for the current month, and the minimum price for Class II milk computed pursuant to

§ 1103.51(b) and the Class II butterfat differential computed pursuant to § 1103.52(b), both for the previous month;

(2) On or before the 10th day after the end of each of the months of August through February, the uniform price computed pursuant to § 1103.71, and the butterfat differential computed pursuant to § 1103.91; and

(3) On or before the 10th day after the end of each of the months of March through July, the uniform prices for base milk and for excess milk computed pursuant to § 1103.72, and the butterfat differential computed pursuant to § 1103.91;

(j) On or before the 12th day after the end of each month, report to each cooperative association which so requests, the percentage of producer milk delivered by members of such association, which was used in each class by each handler receiving such milk. For the purpose of this report, the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by each handler; and

(k) Prepare and disseminate to the public such statistics and such information as he deems advisable and as do not reveal confidential information.

REPORTS, RECORDS AND FACILITIES

§ 1103.30 Reports of receipts and utilization.

On or before the 6th day after the end of each month, each handler, except a producer-handler, shall report to the market administrator in the detail and on forms prescribed by the market administrator for each of his approved plants for such month as follows:

(a) The quantities of skim milk and butterfat contained

in receipts of producer milk; and for the months of March through July, the total quantity of base milk received;

(b) The quantities of skim milk and butterfat contained in fluid milk products received from other pool plants;

(c) The quantities of skim milk and butterfat contained in other source milk;

(d) Inventories of fluid milk products on hand at the beginning and end of the month; and

(e) The utilization of all skim milk and butterfat required to be reported pursuant to this section, including a separate statement of the disposition of Class I milk outside the marketing area.

§ 1103.31 Other reports.

(a) Each producer-handler shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe.

(b) Each handler, except a producer-handler, shall report to the market administrator in detail and on forms prescribed by the market administrator:

(1) On or before the 20th day after the end of the month for each of his fluid milk plants, his producer payroll for such month, which shall show for each producer: (i) His name and address (ii) the total pounds of milk received from such producer, including for the months of March through July, the total pounds of base and excess milk, (iii) the number of days on which milk was received from such producer if less than a full calendar month, (iv) the average butterfat content of such milk, and (v) the net amount of such handler's payment, together with the price paid and the amount and nature of any deductions;

(2) On or before the first day other source milk is received in the form of milk, fluid skim milk, or cream at his pool plant(s), his intention to receive such product, and on

or before the last day such product is received, his intention to discontinue receipt of such milk;

(3) On or before the day prior to diverting producer milk pursuant to § 1103.13, his intention to divert such milk, the date(s) of such diversion and the nonpool plant to which such milk is to be diverted; and

(4) Such other information with respect to the utilization of butterfat and skim milk as the market administrator may prescribe.

(c) Each handler who receives producer milk for which payment is to be made to a cooperative association pursuant to § 1103.90(e) shall report to such cooperative association with respect to each such producer, as follows:

(1) On or before the 20th day of each month, the total pounds of milk received during the first 15 days of the month,

(2) On or before the 10th day after the end of each month:

(i) The daily and total pounds of milk received during the month with separate totals for base and excess milk for the months of March through July, and the average butterfat test thereof; and

(ii) The amount or rate and nature of any deductions.

§ 1103.32 Records and facilities.

Each handler shall maintain and make available to the market administrator during the usual hours of business, such accounts and records of his operations, together with such facilities as are necessary for the market administrator to verify or establish the correct data for each month with respect to:

(a) The receipt and utilization of all skim milk and butterfat handled in any form;

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(b) The weights and butterfat and other content of all milk, skim milk, cream, and other milk products handled;

(c) The pounds of skim milk and butterfat contained in or represented by all milk, skim milk, cream, and milk products on hand at the beginning and end of each month; and

(d) Payments to producers, including any deductions authorized by producers, and disbursement of money so deducted.

§ 1103.33 Retention of records.

All books and records required under this part to be made available to the market administrator, shall be retained by the handler for a period of three years to begin at the end of the calendar month, to which such books and records pertain: *Provided,* That if, within such three-year period, the market administrator notifies the handler in writing that the retention of such books and records, or of specified books and records, is necessary in connection with a proceeding under section 8c(15) (A) of the act or a court action specified in such notice, the handler shall retain such books and records, or specified books and records, until further written notification from the market administrator. In either case, the market administrator shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

CLASSIFICATION

§ 1103.40 Skim Milk and Butterfat to be Classified.

All skim milk and butterfat received within the month at pool plants and which is required to be reported pursuant to § 1103.30 shall be classified by the market administrator pursuant to the provisions of §§ 1103.41 to 1103.46.

§ 1103.41 Classes of utilization.

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Subject to the conditions set forth in §§ 1103.43 and 1103.44, the classes of utilization shall be as follows:

(a) *Class I milk.* Class I milk shall be all skim milk (including concentrated and reconstituted skim milk) and butterfat:

(1) Disposed of in fluid milk products;

(2) Contained in inventory of milk and milk products designated as Class I milk pursuant to subparagraph (1) of this paragraph on hand at the end of the month; and

(3) Not accounted for as Class II milk.

(b). *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Used to produce any product other than those designated as Class I milk pursuant to paragraph (a) of this section;

(2) Disposed of and used for livestock feed;

(3) Contained in skim milk dumped, provided the market administrator is notified in advance and given opportunity to verify such dumping; and

(4) In shrinkage, but in an amount not to exceed one-half percent of the total pounds of skim milk and butterfat received directly from producers plus 1½ percent of the total pounds of skim milk and butterfat in bulk milk, skim milk, and cream in fluid form received at a pool plant from all sources less that disposed of in bulk to a pool plant of another handler.

§ 1103.42 Assignment of shrinkage.

The market administrator shall assign shrinkage at the pool plant(s) of each handler as follows:

(a) Compute the shrinkage of skim milk and butterfat classified as Class II milk; and

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(b) Assign the resulting amounts pro rata to the handler's receipts of skim milk and butterfat, respectively, in (1) producer milk and milk received from other pool plants, and (2) other source milk.

§ 1103.43 Responsibility of handlers and reclassification of milk.

(a) All skim milk and butterfat shall be Class I milk unless the handler who first receives such skim milk or butterfat can prove to the market administrator that such skim milk or butterfat should be classified otherwise;

(b) Any skim milk or butterfat shall be reclassified if verification by the market administrator discloses that the original classification was incorrect.

§ 1103.44 Transfers.

Skim milk and butterfat transferred or diverted during the month as a fluid milk product from a pool plant to:

(a) The pool plant of another handler shall be classified as Class I, unless;

(1) Class II utilization is indicated by the operators of both plants in their reports submitted pursuant to § 1103.30,

(2) The receiving plant has utilization in Class II of equivalent amounts of skim milk and butterfat, respectively; and

(3) Such skim milk and butterfat shall be classified so as to allocate to producer milk the greatest possible Class I utilization in the two plants.

(b) A nonpool plant that is a pool plant (a fully regulated plant) under another order issued pursuant to the Act shall be classified, if transferred in bulk pursuant to the classification and allocation procedure of the other Federal order: *Provided,* That in the event such nonpool plant re-

ceives skim milk and butterfat from two or more plants regulated by an order(s) other than that under which it is regulated, the amount classified in each class shall be a pro rata share of such receipts allocated to that class.

(c) A nonpool plant, except as specified in paragraph (b) of this section, shall be Class I milk unless:

(1) The transferring handler claims Class II use on his report for the month;

(2) The operator of the nonpool plant maintains books and records which are made available for examination upon request by the market administrator and which are adequate for verification of such Class II use; and

(3) The skim milk and butterfat, respectively, received in the form of fluid milk products at the nonpool plant during the month from a pool plant(s) (except the amounts pursuant to subparagraph (4) of this paragraph and the similar provision of such other order) and from a plant(s) at which milk is priced pursuant to another order issued pursuant to the Act does not exceed the skim milk and butterfat, respectively, resulting from the following computation:

(i) Determine the skim milk and butterfat, respectively, in Class II (as defined pursuant to § 1103.41(b) (1)) at such nonpool plant during the month;

(ii) Subtract the overage or add the actual shrinkage not to exceed 2 percent of total receipts of skim milk and butterfat, respectively, in the total fluid receipts physically received at such nonpool plant during the month;

(iii) Add the increases or subtract the decreases of skim milk and butterfat, respectively, in the inventory of fluid milk products at the end of the month at such nonpool plant as compared with that at the beginning of the month;

(iv) Add the skim milk and butterfat, respectively, in milk, skim milk, or cream transferred in bulk from such

nonpool plant to a plant at which milk is priced under this or another order issued pursuant to the Act which is allocated to other than Class I under the applicable order provisions at the transferee plant, but excluding any such transfers that may be classified under this or such other order pursuant to provisions similar to subparagraph (4) of this paragraph: *Provided*, That if skim milk and butterfat are received from unregulated sources at such tranferee plant, such skim milk and butterfat, respectively, shall be assigned to Class II at such plant to the maximum extent possible for the purpose of this subsection;

(v) Add the skim milk and butterfat, respectively, in fluid bulk cream transferred from such nonpool plant to a second nonpool plant which is not in excess of Class II (pursuant to § 1103.41(b) (1) processed in such second nonpool plant plus the bulk fluid cream shipped therefrom to other nonpool plants which do not dispose of milk or cream in consumer packages for consumption in fluid form: *Provided*, That the second nonpool plant meets the conditions of subparagraph (2) of this paragraph; and

(vi) Subtract the skim milk and butterfat, respectively, received at such nonpool plant from any source(s) other than that which has been approved by a governmental agency as a source(s) of Grade A fluid milk products. In the event that the remaining skim milk and butterfat, respectively, is less than the skim milk and butterfat, respectively, received at such nonpool plant from a pool plant(s) and from a plant(s) at which milk is priced under another order issued pursuant to the Act, the difference shall be assigned pro rata to each pool plant (in accordance with receipts of skim milk and butterfat, respectively, from all plants regulated pursuant to the Act) and shall be classified as Class I milk; and

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(4) If such nonpool plant transfers skim milk or butterfat as milk, skim, or cream in bulk to a pool plant, the amount so transferred which is not in excess of receipts during the month at such nonpool plant from pool plants shall be excluded from receipts within the meaning of subparagraph (3) of this paragraph and shall be classified pursuant to paragraph (a) of this section as if moved directly to the second pool plant with Class II utilization indicated: *Provided*, That if the classification limitations provided in paragraph (a) of this section result in any skim milk or butterfat being classified as Class I from pool plants of two or more handlers, such classification shall be shared pro rata between such handlers unless, at or before the time of reporting, signed statements by operators of such plants indicate agreement on a different sharing of such Class I classification. (Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10336, Oct. 28, 1960]

§ 1103.45 Computation of the skim milk and butterfat in each class.

For each month, the market administrator shall correct for mathematical and for other obvious errors the reports of receipts and utilization for the pool plant(s) of each handler and shall compute the pounds of butterfat and skim milk in Class I milk and Class II milk for such handler: *Provided*, That if any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk disposed of in such product shall be considered to be an amount equivalent to the nonfat dry milk contained in such product, plus all of the water originally associated with such solids.

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§ 1103.46 Allocation of skim milk classified.

The pounds of skim milk remaining after making the following computation shall be the pounds in each class allocated to producer milk:

(a) Subtract from the total pounds of skim milk in Class II the pounds of skim milk determined pursuant to § 1103.42 (b) (1);

(b) Subtract from the remaining pounds of skim milk in each class, in series beginning with Class II milk, the pounds of skim milk received as other source milk other than in the form of fluid milk products;

(c) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class II, the pounds of skim milk in other source milk received in the form of fluid milk products, except that to be subtracted pursuant to paragraph (d) of this section;

(d) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class II, the pounds of skim milk received from plants subject to the Class I pricing and payment provisions of another order issued pursuant to the Act;

(e) Subtract from the remaining pounds of skim milk in Class I, the pounds of skim milk in inventory of fluid milk products on hand at the beginning of the month;

(f) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk received from pool plants of other handlers in such class pursuant to §§ 1103.41 and 1103.44(a).

(g) Add to the remaining pounds of skim milk in Class II the pounds subtracted pursuant to paragraph (a) of this section; and

(h) If the remaining pounds of skim milk in all classes exceeds the pounds of skim milk received from producers, subtract such excess from the remaining pounds of skim milk in each class in series beginning with Class II. Any amount so subtracted shall be known as overage.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10337 Oct. 28, 1960]

§ 1103.47 Allotment of butterfat classified.

Allocate the pounds of butterfat in each class to producer milk in the same manner as that prescribed for skim milk in § 1103.46.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10337, Oct. 28, 1960]

§ 1103.48 Computation of total producer milk in each class.

Combine into one total the amounts computed pursuant to §§ 1103.46 and 1103.47 for each class and determine the weighted average butterfat content of producer milk.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10337, Oct. 28, 1960]

MINIMUM PRICES

§ 1103.50 Basic formula price.

The basic formula price shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Wisconsin and Minnesota, as reported by the Department of Agriculture for the month, adjusted to a 3.5 percent butterfat basis by a butterfat differential rounded to the nearest one-tenth cent computed at 0.12 times the Chicago butter price for the month. The basic formula price shall be rounded to the nearest full cent.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [27 F.R. 7553, Aug. 1, 1962]

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§ 1103.51 Class prices.

Subject to the provisions of §§ 1103.52 and 1103.53, the minimum prices per hundredweight for the month shall be as follows:

(a) *Class I milk price.* The Class I milk price shall be the basic formula price for the preceding month plus $2.16.

(b) *Class II milk prices.* The Class II milk price shall be the average of the basic or field prices per hundredweight reported to have been paid or to be paid for milk of 4.0 percent butterfat content received from farmers during the month at the plants or places listed below for which prices have been reported to the market administrator or to the Department of Agriculture subject to the adjustments provided in subparagraphs (1) and (2) of this paragraph;

Present Operator and Location

McClendon Cheese Co., Newton, Miss.
Borden Co., Starkville, Miss.
Carnation Co., Tupelo, Miss.
Pet Milk Co., Kosciusko, Miss.

(1) Subtract five times the butterfat differential computed pursuant to § 1103.52(b); and

(2) Add 10 cents during each of the months of March through June and 20 cents during all other months.

(Secs. 1-19, 48 Stat. 31, as amended, 7 U.S.C. 601-674) [27 F.R. 7553, Aug. 1, 1962]

§ 1103.52 Butterfat differential to handlers.

For milk containing more or less than 3.5 percent butterfat, the class prices calculated pursuant to § 1103.51 shall be increased or decreased, respectively, for each one-tenth percent butterfat at the appropriate rate determined as follows:

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(a) *Class I price.* Multiply the Chicago butter price for the preceding month by 0.12; and

(b) *Class II price.* Multiply the Chicago butter price for the month by 0.11.

[23 F.R. 5653, July 26, 1958, as amended at 27 F.R. 7553, Aug. 1, 1962]

§ 1103.53 Location differentials to handlers.

For that milk which is received from producers at a pool plant located 50 miles or more from the city limits of Hattiesburg, Jackson, Meadville, or Meridian, Mississippi, whichever is closest by the shortest hard-surfaced highway distance as determined by the market administrator, and which is transferred in the form of fluid milk products to another pool plant and assigned to Class I pursuant to the proviso of this section, or otherwise classified as Class I milk, the price specified in § 1103.51 (a) shall be reduced at the rate set forth in the following schedule:

Distance from the city limits of Hattiesburg, Jackson, Meadville or Meridian, Miss. (miles):	*Rates per hundredweight (cents)*
50 but not more than 60	10.0
For each additional 10 miles or fraction thereof, an additional	1.5

Provided, That, for the purposes of calculating such location differential, products so designated as Class I milk which are transferred between pool plants shall be assigned to any remainder of Class II milk in the transferee-plant after making the calculation prescribed in § 1103.46(d) and the corresponding steps of 1103.47 for such plant, and after deducting from such remainder an amount equal to 0.05 times the skim milk and butterfat contained in the producer milk

received at the transferee-plant, such assignment to transferor-plants to be made first to plants at which the greatest location differential is applicable.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10337, Oct. 28, 1960]

§ 1103.54 Rates of payment on other source milk.

The following rates of payment on other source milk to be applied pursuant to § 1103.70 (d) and (e) shall be effective only in the months when the total receipts of producer milk are more than 110 percent of the total amount from all sources classified as Class I (excluding duplications) at all pool plants:

(a) On other source milk received other than in the form of fluid milk products, subtract the Class II price adjusted by the Class II butterfat differential from the Class I price adjusted by the Class I butterfat differential; and

(b) On other source milk received in the form of fluid milk products, subtract the Class II price adjusted by the Class II butterfat differential from the Class I price adjusted by the Class I butterfat differential, and adjust such difference at the same rate of location differential as set forth in § 1103.53 for the location of the nearest nonpool plant(s) supplying such other source milk.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10337, Oct. 28, 1960]

§ 1103.55 Use of equivalent prices.

If, for any reason, a price specified in this part for use in computing class prices or for other purposes is not reported or published in the manner described in this part, the market administrator shall use a price determined by the Secretary to be equivalent to or comparable with the price specified.

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APPLICATION OF PROVISIONS

§ 1103.60 Producer-handlers.

Sections 1103.40 to 1103.46, 1103.50 to 1103.54, 1103.61, 1103.62, and 1103.70 to 1103.72, 1103.80 to 1103.83, and 1103.90 to 1103.98 shall not apply to a producer-handler.

§ 1103.61 Plants subject to other Federal orders.

The provisions of this part shall not apply to a plant specified in paragraph (a) or (b) of this section except as follows: The operator of such plant shall, with respect to the total receipts and utilization or disposition of skim milk and butterfat at the plant, make reports to the market administrator at such time and in such manner as the market administrator may require and allow verification of such reports by the market administrator.

(a) Any distributing plant which would be subject to the classification and pricing provisions of another order issued pursuant to the act unless a greater volume of Class I milk is disposed of during the month from such plant to retail or wholesale outlets (except pool plants) in the Central Mississippi marketing area than in the marketing area regulated pursuant to such other order: *Provided*, That, if such distributing plant disposed of Class I milk during the month in the marketing areas of more than one other Federal order, the marketing area in which the most Class I milk is disposed shall determine the Federal order under the provisions of which such plant shall be regulated; and

(b) Any supply plant which would be subject to the classification and pricing provisions of another order issued pursuant to the act unless such plant qualified as a pool plant pursuant to § 1103.8.

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§ 1103.62 Obligations of a handler operating a nonpool distributing plant.

Each handler who operates during the month a nonpool distributing plant shall pay to the market administrator for deposit in the producer settlement fund and the administrative assessment fund, as the case may be, as follows:

(a) If such handler so elects in writing at the time of reporting pursuant to § 1103.30, the amounts computed as follows:

(1) On or before the 15th day after the end of the month, for the producer settlement fund, an amount equal to the difference between the value of the Class I milk disposed of during the month on routes in the marketing area at the applicable Class I price for the month and the value of such milk at the Class II price; and

(2) On or before the 15th day after the end of the month, as his pro rata share of expense of administration, the rate specified in § 1103.95 with respect to Class I milk disposed of on routes in the marketing area and

(b) Except as the handler's obligation may be computed pursuant to paragraph (a) of this section, he shall pay the amounts as follows:

(1) On or before the 25th day after the end of the month, for the producer settlement fund, the amount specified in paragraph (a) (1) of this section, or any plus amount resulting from the following computation, whichever is less:

(i) Determine the value for milk received from dairy farmers at such plant for such month pursuant to § 1103.70 as if such plant has been a pool plant; and

(ii) Deduct the gross payments made by the handler to dairy farmers for milk received at such plant for such month. Such gross payments shall be limited to cash payments made

to the dairy farmer or his assignee on or before the date for filing reports required pursuant to § 1103.31 (b), plus the value of any supplies or services furnished by the handler on prior written authorization or as evidenced by a delivery ticket signed by the dairy farmer; and

(2) On or before the 15th day after the end of the month, as his pro rata share of the expense of administration, an amount equal to that which would have been computed pursuant to § 1103.95 had such plant been a pool plant.

DETERMINATION OF UNIFORM PRICE

§ 1103.70 Computation of value of producer milk.

The value of producer milk received during the month by each handler at his pool plant(s) shall be computed by the market administration as follows:

(a) Multiply the pounds of such milk in each class by the applicable class price;

(b) Add together the resulting amounts;

(c) Add the amounts computed by multiplying the pounds of overage deducted from each class by the applicable class prices;

(d) Add an amount computed by multiplying the hundredweight of skim milk and butterfat subtracted from Class I, pursuant to § 1103.46(b) and the corresponding step of § 1103.47, by the rate of payment determined pursuant to § 1103.54(a).

(e) Add an amount computed by multiplying the hundredweight of skim milk and butterfat subtracted from Class I, pursuant to § 1103.46(c) and the corresponding step of § 1103.47, by the rate of payment determined pursuant to § 1103.54(b).

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10337, Oct. 28, 1960]

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§ 1103.71 Computation of the uniform price.

For each of the months of August through February, the market administrator shall compute the uniform price per hundredweight of producer milk of 3.5 percent butterfat content, for plants within the marketing area as follows:

(a) Combine into one total the values computed pursuant to § 1103.70 for the producer milk of all handlers who submit reports prescribed in § 1103.30 and who have made payments for the previous month pursuant to § 1103.97.

(b) Subtract, if the average butterfat content of the producer milk included under paragraph (a) of this section is greater than 3.5 percent, or add, if such average butterfat content is less than 3.5 percent, an amount computed as follows: Multiply the variation in the average butterfat content of such milk from 3.5 percent by the butterfat differential computed pursuant to § 1103.91, and multiply the result by the total hundredweight of such milk;

(c) Add an amount equal to the sum of the deductions to be made from producer payments for location differentials pursuant to § 1103.90(c) (1);

(d) Add an amount equal to one-half of the unobligated balance on hand in the producer-settlement fund;

(e) Divide the resulting amount by the total hundredweight of producer milk included under paragraph (a) of this section; and

(f) Subtract not less than 4 cents nor more than 5 cents.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10337, Oct. 28, 1960, 27 F.R. 7553, Aug. 1, 1962]

§ 1103.72 Computation of uniform prices for base milk and excess milk.

For each of the months of March through July, the market administrator shall compute the uniform prices per hun-

dredweight for base milk and for excess milk, each of 3.5 percent butterfat content, for plants within the marketing area, as follows:

(a) Compute the aggregate value of excess milk for all handlers who submit reports pursuant to § 1103.30, and who have made payments for the previous month pursuant to § 1103.97, as follows: (1) Multiply the hundredweight of such milk not in excess of the total quantity of producer milk assigned to Class II milk in the pool plants of such handlers by the Class II milk price; (2) multiply any additional hundredweight of such milk by the Class I milk price; and (3) add together the resulting amounts.

(b) Divide the aggregate value of excess milk obtained in paragraph (a) of this section by the total hundredweight of such milk, adjust to the nearest cent and subtract 4 cents. The resulting figure shall be the uniform price for excess milk of 3.5 percent butterfat content received from producers;

(c) Subtract an amount determined by multiplying the uniform price obtained in paragraph (b) of this section, plus 4 cents, times the hundredweight of excess milk from the total value of producer milk for the month as determined according to the calculations set forth in § 1103.71 (a) to (d);

(d) Divide the result obtained pursuant to paragraph (c) of this section by the total hundredweight of base milk of handlers included in these computations; and

(e) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (d) of this section. The resulting figure shall be the uniform price for base milk of 3.5 percent butterfat content for plants within the marketing area.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10337, Oct. 28, 1960, 27 F.R. 7553, Aug. 1, 1962]

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BASE RATING

§ 1103.80 Determination of daily base.

The daily base of each producer shall be calculated by the market administrator as follows: Divide the total pounds of milk received by all pool plants from such producer during the months of September through January by the larger of:

(a) 120 days, or

(b) The number of days beginning with the first day in such months on which milk is received from such producer and ending with January 31 (plus the number of days prior to the day of such first receipts on which such milk was produced, and minus the number of days in January on which milk received from such producer in February was produced).

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10338, Oct. 28, 1960]

§ 1103.81 Computation of base.

The base of each producer to be applied during the months of March through July shall be a quantity of milk calculated by the market administrator in the following manner: Multiply the daily base of such producer by the number of days production delivered by such producer to handler during the month.

§ 1103.82 Base rules.

The following rules shall apply in connection with the establishment of bases:

(a) A base shall be assigned to the producer for whose account milk is received at a pool plant during the months of September through January and to each person for whose account milk was delivered to a plant that did not

qualify as a pool plant during each month of the base forming period, but which qualifies as a pool plant during any of the months of March through July, bases shall be assigned on deliveries at such plant in the same manner as if such plant had been a pool plant during each month of the base forming period; and

(b) An entire base shall be transferred by the market administrator to another person upon receipt of an application form, approved by the market administrator, and signed by the base-holder(s), or his heirs, and by the person to whom such base is transferred subject to the following condition:

(1) If a base is transferred to a producer already holding a base, a new base shall be computed by adding together the producer milk deliveries of the transferee and the transferor during the base forming period and dividing the total by the larger of:

(i) 120 days; or

(ii) The number of days beginning with the first day on which milk is received from either the transferee or transferor during the base-forming period and ending with January 31 (plus the number of days prior to the day of such first receipt on which such milk was produced, and minus the number of days in January on which milk received from such producer in February was produced).

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10338, Oct. 28, 1960]

§ 1103.83 Announcement of established bases.

On or before March 1 of each year, the market administrator shall notify each producer and the handler receiving milk from such producer of the daily base established by such producer.

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PAYMENTS

§ 1103.90 Payments to producers.

Except as provided in parargaph (e) of this section, each handler shall make payment to each producer from whom milk is received during the month as follows:

(a) On or before the last day of each month, for milk received during the first 15 days of the month, at not less than the price per hundredweight for Class II milk for the preceding month;

(b) On or before the 15th day after the end of each of the months of August through February for milk received during such month at not less than the uniform price per hundredweight, computed for such handler pursuant to § 1103.71, subject to the butterfat differential computed pursuant to § 1103.91 and the location differential computed pursuant to § 1103.92, less proper deductions authorized in writing by such producer and less payment made pursuant to paragraph (a) of this section, and deductions made pursuant to § 1103.94;

(c) On or before the 15th day after the end of each of the months of March through July, after allowance for the amount of payment made pursuant to paragraph (a) of this section for deductions made pursuant to § 1103.94, and for other proper deductions authorized in writing by such producer, as follows:

(1) At not less than the uniform price per hundredweight for base milk computed pursuant to § 1103.72 for the quantity of base milk received from such producer during the month, subject to the butterfat differential computed pursuant to § 1103.91 and the location differential computed pursuant to § 1103.92; and

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(2) At not less than the uniform price per hundredweight for excess milk computed pursuant to § 1103.72 for the quantity of excess milk received from such producer during the month, subject to the butterfat differential computed pursuant to § 1103.91 and the location differential computed pursuant to § 1103.92;

(d) In making the payments to producers pursuant to paragraphs (b) and (c) of this section, each handler shall furnish each producer from whom he has received milk with a supporting statement in such form that it may be retained by the producer, which shall show for each month:

(1) The month and the identity of the handler and of the producer;

(2) The daily and total pounds and the average butterfat content of milk received from such producer;

(3) The minimum rate or rates at which payment to such producer is required pursuant to this part;

(4) The rate which is used in making the payment, if such rate is other than the applicable minimum rate;

(5) The amount or the rate per hundredweight and nature of each deduction claimed by the handler; and

(6) The net amount of payment to such producer.

(e) In lieu of payments pursuant to paragraphs (a), (b) and (c) of this section, each handler shall make payment to a cooperative association which has filed a written request for such payment with such handler and with respect to producers for whose milk the market administrator determines that such cooperative association is authorized to collect payment, as follows:

(1) On or before the 26th day of each month, an amount equal to not less than the Class II price for the preceding month, multiplied by the hundredweight of milk received

during the first 15 days of the month from such producers, and

(2) On or before the 13th day after the end of each month an amount equal to not less than the applicable uniform price(s) pursuant to §§ 1103.71 and 1103.72, multiplied by the hundredweight of milk received from such producers to which each such price is applicable, subject to the butterfat differential computed pursuant to § 1103.91 and the location differential computed pursuant to § 1103.92, less payment made such cooperative association pursuant to subparagraph (1) of this paragraph, and proper deductions authorized in writing by such producers or such cooperative associations; and

(f) On or before the 13th day after the end of the month, each handler shall pay to each cooperative association which is also a handler, for milk received from it not less than the value of such milk as classified pursuant to § 1103.44 (a) at the applicable respective class prices, including differentials prescribed by the order.

§ 1103.91 Butterfat differential to producers.

The applicable uniform prices to be paid each producer pursuant to § 1103.90 shall be increased or decreased for each one-tenth of one percent which the butterfat content of his milk is above or below 3.5 percent, respectively, at the rate determined by multiplying the pounds of butterfat in producer milk allocated to Class I and Class II milk pursuant to § 1103.46 (b) by the respective butterfat differential for each class, dividing the sum of such values by the total pounds of such butterfat and rounding the resultant figure to the nearest half cent.

[23 F.R. 5653, July 26, 1958, as amended at 27 F.R. 7553, Aug. 1, 1962]

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§ 1103.92 Location differentials to producers.

In making payment to producers pursuant to § 1103.90, the applicable uniform prices to be paid for producer milk received at a pool plant located 50 miles or more from the city limits of Hattiesburg, Jackson, Meadville, or Meridian, Mississippi, whichever is closest by the shortest hard-surfaced highway distance, as determined by the market administrator, shall be reduced at the rate set forth in the following schedule:

Distance from the city limits of Hattiesburg, Jackson, Meadville or Meridian, Miss. (miles):	Rates per hundredweight (cents)
50 but not more than 60	10.0
For each additional 10 miles or fraction thereof, an additional	1.5

§ 1103.93 Adjustment of accounts.

Whenever audit by the market administrator of any handler's reports, books, records, or accounts, or verification of weights and butterfat tests of milk or milk products discloses errors resulting in money due (a) the market administrator from a handler, (b) a handler from the market administrator, or (c) any producer or cooperative association from a handler, the market administrator shall promptly notify such handler of any amount so due and payment thereof shall be made on or before the next date for making payments set forth under which such error occurred.

§ 1103.94 Marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler, in making payments to producers for

milk (other than milk of his own production) pursuant to § 1103.90, shall deduct 7 cents per hundredweight, or such amount not exceeding 7 cents per hundredweight, as may be prescribed by the Secretary, and shall pay such deductions to the market administrator on or before the 15th day after the end of each month. Such moneys shall be used by the market administrator to provide market information and to check the accuracy of the testing and weighing of their milk for producers who are not receiving such service from a cooperative association; and

(b) In the case of producers who are members of a cooperative association which the Secretary has determined is actually performing the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made to such producers as may be authorized by the membership agreement or marketing contract between such cooperative association and such producers on or before the 15th day after the end of each month, and pay such deductions to the cooperative association of which such producers are members, furnishing a statement showing the amount of any such deductions and the amount and average butterfat test of milk received from each such producer.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10338, Oct. 28, 1960]

§ 1103.95 Expense of administration.

As his pro rata share of the expense of administration of this part, each handler shall pay to the market administrator on or before the 15th day after the end of the month, for the immediately preceding month, five cents per hundredweight, or such amount not exceeding five cents per

hundredwieght, as the Secretary may prescribe, with respect to all:

(a) Receipts of producer milk, including such handler's own production;

(b) Other source milk allocated to Class I pursuant to § 1103.46 (b) and (c) and the corresponding steps of § 1103.47; and

(c) Applicable amounts specified in § 1103.62 (a) (2) or (b) (2).

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10338, Oct. 28, 1960]

§ 1103.96 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 1103.62, 1103.93 and 1103.97, and out of which he shall make all payments pursuant to §§ 1103.93 and 1103.98: *Provided*, That any payments due to any handler shall be offset by any payments due from such handler.

§ 1103.97 Payments to the producer-settlement fund.

On or before the 12th day after the end of each month, each handler shall pay, except as provided in § 1103.62, to the market administrator any amount by which the value of his producer milk as computed pursuant to § 1103.70 for such month, is greater than the amount owed by him for such milk at the appropriate uniform price(s) adjusted by the producer butterfat and location differentials.

§ 1103.98 Payments out of the producer-settlement fund.

On or before the 13th day after the end of each month, the market administrator shall pay to each handler any amount by which the total value of his producer milk, com-

puted pursuant to § 1103.70, for such month is less than the amount owed by him for such milk at the appropriate uniform price(s) adjusted by the producer butterfat and location differentials. If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the appropriate funds are available.

§ 1103.99 Overdue accounts.

Any unpaid obligation of a handler or of the market administrator pursuant to §§ 1103.62, 1103.93, 1103.94 (a), 1103.95, 1103.97, or 1103.98 shall be increased one-half of one percent each month or fraction thereof starting the third day after the date such obligation is due until such obligation is paid. Any remittance received by the market administrator postmarked not later than the date such obligation is due shall be considered to have been received when due.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674) [25 F.R. 10338, Oct. 28, 1960]

§ 1103.100 Termination of obligations.

The provisions of this section shall apply to any obligation under this part for the payment of money.

(a) The obligation of any handler to pay money required to be paid under the terms of this part shall, except as provided in paragraphs (b) and (c) of this section, terminate two years after the last day of the calendar month during which the market administrator receives the handler's utilization report on the milk involved in such obligation, unless within such two-year period the market administrator notifies the handler in writing that such money

is due and payable. Service of such notice shall be complete upon mailing to the handler's last known address, and it shall contain but need not be limited to, the following information:

(1) The amount of the obligation;

(2) The month(s) during which the milk, with respect to which the obligation exists, was received or handled; and

(3) If the obligation is payable to one or more producers or to an association of producers, the name of such producer(s) or association of producers, or if the obligation is payable to the market administrator, the account for which it is to be paid.

(b) If a handler fails or refuses, with respect to any obligation under this part, to make available to the market administrator or his representatives all books and records required by this part to be made available, the market administrator may, within the two-year period provided for in paragraph (a) of this section, notify the handler in writing of such failure or refusal. If the market administrator so notifies a handler, the said two-year period with respect to such obligation shall not begin to run until the first day of the calendar month following the month during which all such books and records pertaining to such obligation are made available to the market administrator or his representatives.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under this part to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed.

(d) Any obligation on the part of the market administrator to pay any handler any money which such handler

claims to be due him under the terms of this part shall terminate two years after the end of the calendar month during which the milk involved in the claim was received if an underpayment is claimed, or two years after the end of the calendar month during which the payment (including deduction or set-off by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable period of time, files, pursuant to section 8c (15) (A) of the act, a petition claiming such money.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10338, Oct. 28, 1960]

§ 1103.103 Liquidation.

Upon the suspension or termination of the provisions of this part, except this section, the market administrator, or such liquidating agent as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office, dispose of all property in his possession or control, including accounts receivable, and execute and deliver all assignment or other instruments necessary or appropriate to effectuate any such disposition. If a liquidating agent is so designated, all assets, books and records of the market administrator shall be transferred promptly to such liquidating agent. If, upon such liquidation, the funds on hand exceed the amounts required to pay outstanding obligations of the office of the market administrator and to pay necessary expenses of liquidating and distribution, such excess shall be distributed to contributing handlers and producers in an equitable manner.

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EFFECTIVE TIME, SUSPENSION OR TERMINATION

§ 1103.105 Effective time.

The provisions of this part or any amendment to this part shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated pursuant to § 1103.106.

[23 F.R. 5653, July 26, 1958, as amended at 25 F.R. 10338, Oct. 28, 1960]

§ 1103.106 Suspension or termination.

The Secretary may suspend or terminate this part or any provision of this part whenever he finds this part or any provision of this part obstructs or does not tend to effectuate the declared policy of the act. This part shall terminate, in any event, whenever the provisions of the act authorizing it cease to be in effect.

[23 F.R. 5653, July 26, 1958, as amended at 25 F. R. 10338, Oct. 28, 1960]

§ 1103.107 Continuing obligations.

If, upon the suspension or termination of any or all provisions of this part, there are any obligations thereunder, the final accrual or ascertainment of which requires further acts by any person (including the market administrator), such further acts shall be performed notwithstanding such suspension or termination.

[23 F.R. 5653, July 26, 1958, as amended at 25 F. R. 10338, Oct. 28, 1960]

MISCELLANEOUS PROVISIONS

§ 1103.110 Agents.

The Secretary may, by designation in writing, name any officer or employee of the United States to act as his agent

or representative in connection with any of the provisions of this part.

§ 1103.111 Separability of provisions.

If any provision of this part, or its application to any person or circumstances is held invalid, the application of such provision and of the remaining provisions of this part, to other persons or circumstances shall not be affected thereby.

APPENDIX B.

2 — Order Prior To Amendment

DEFINITIONS

§ 987.1 *Act.* "Act" means Public Act No. 10, 73d Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.).

§ 987.2 *Secretary.* "Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the United States authorized to exercise the powers or to perform the duties of the said Secretary of Agriculture.

§ 987.3 *Department of Agriculture.* "Department of Agriculture" means the United States Department of Agriculture or any other Federal agency authorized to perform the price reporting functions specified in this part.

§ 987.4 *Person.* "Person" means any individual, partnership, corporation, association, or other business unit.

§ 987.5 *Cooperative association.* "Cooperative association" means any cooperative marketing association

which the Secretary determines, after application by the association:

(a) To be qualified under the provisions of the act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act"; and

(b) To have full authority in the sale of milk of its members and to be engaged in making collective sales of or marketing milk or its products for its members.

§ 987.6 *Central Mississippi marketing area.* "Central Mississippi marketing area," hereinafter called the "marketing area," means all the territory within the following counties: Claiborne, Copiah, Covington, Forrest, Hinds, Jasper, Jefferson Davis, Jones, Madison, Marion, Perry, Rankin, Scott, Simpson, Smith, Walthall, Warren, Wayne, Lamar (except beat 2 thereof), and Lawrence (except beats 1, 2 and 3 thereof).

§ 987.7 *Distributing plant.* "Distributing plant" means an approved plant from which Class I milk equal to not less than 50 percent of its receipts of producer milk and fluid milk products from other pool plants is disposed of during the month, on routes or through plant stores, to wholesale or retail outlets (except pool plants) and from which not less than 20 percent of such Class I milk is disposed of during the month on routes or through plant stores, to wholesale or retail outlets (except pool plants) located in the marketing area.

§ 987.8 *Supply plant.* "Supply plant" means (a) an approved plant from which fluid milk products equal to not less than 50 per cent of its producer milk during the month, are shipped to distributing plants: *Provided*, That any plant

which qualifies as a supply plant during each of the months of August through January shall be designated as a supply plant for the following months of February through July unless the operator of such plant notifies the market administrator on or before January 31, that such status is not desired: *And provided further*, That any plant which shipped not less than 50 percent of its producer milk to a distributing plant during each of the months of November and December 1955, shall be designated as a supply plant from the effective date hereof through July 1956 unless the operator of such plant notifies the market administrator within ten days of the effective date hereof that such status is not desired.

§ 987.9 *Pool plant.* "Pool plant" means either a distributing plant or a supply plant, except a plant operated by a producer-handler.

§ 987.10 *Nonpool plant.* "Nonpool plant" means any milk manufacturing or processing plant other than a pool plant.

§ 987.11 *Approved plant.* "Approved plant" means all of the buildings, premises and facilities of a plant (a) in which milk or skim milk is processed or packaged and from which any fluid milk product is disposed of during the month on routes (including routes operated by vendors and sales through plant stores) to wholesale or retail outlet (except milk distributing or processing plants) located in the marketing area, or (b) from which milk or skim milk eligible for distribution in the marketing area under a Grade A label is shipped during the month to a distributing plant.

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§ 987.12 *Handler.* "Handler" means:

(a) A cooperative association with respect to milk of producers diverted for the account of such association from a pool plant to a nonpool plant in accordance with the prosions of § 987.13; or

(b) Any person in his capacity as the operator of one or more approved plants: *Proided,* That if a person operates more than one pool plant he may, upon written application to the market administrator, be considered as a separate handler for the month with respect to one or more of his pool plants, if no fluid milk products or producers are transferred during the month between such plant(s) and other pool plant(s) of such handler.

§ 987.13 *Producer.* "Producer" means any person, other than a producer-handler, who produces milk in compliance with Grade A inspection requirements of a duly constituted health authority, which milk is received during the month at a pool plant: *Provided,* That if such milk is diverted from a pool plant by a handler to a nonpool plant for his account any day during the months of January through August, or on not more than 10 days during any other month, the milk so diverted shall be deemed to have been received at a pool plant at the location of the plant from which diverted.

§ 987.14 *Producer milk.* "Producer milk" means only the skim milk or butterfat contained in milk (a) received at the plant directly from producers, or (b) diverted from a pool plant to a nonpool plant (except a nonpool plant which is fully subject to the pricing provisions of another order issued pursuant to the Act) in accordance with the provisions of § 987.13.

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§ 987.15 *Other source milk.* "Other source milk" means all skim milk and butterfat contained in: (a) Receipts during the month of fluid milk products except (1) fluid milk products received from pool plants, and (2) producer milk; and (b) products, other than fluid milk products, from any source (including those produced at the plant) which are reprocessed or converted to another product in the plant during the month.

§ 987.16 *Producer-handler.* "Producer-handler" means any person who operates a dairy farm and a distributing plant which, during the month, has no other source milk (except own production) or producer milk.

§ 987.17 *Chicago butter price.* "Chicago butter price" means the simple average, as computed by the market administrator, of the daily wholesale selling prices (using the midpoint of any range as one price) per pound of 92-score bulk creamery butter at Chicago as reported during the month by the Department of Agriculture.

§ 987.18 *Fluid milk product.* "Fluid milk product" means all skim milk (including concentrated and reconstituted skim milk) and butterfat in the form of milk, skim milk, buttermilk, flavored milk, flavored milk drinks (including eggnog), yogurt, cream (other than frozen storage cream), cultured sour cream, and any mixture of cream and milk or skim milk (other than ice cream, ice cream mixes, and sterilized products contained in hermetically sealed containers).

MARKET ADMINISTRATOR

§ 987.20 *Designation.* The agency for the administration of this part shall be a market administrator, selected by

the Secretary, who shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

§ 987.21 *Powers.* The market administrator shall have the following powers with respect to this part:

(a) To administer its terms and provisions;

(b) To receive, investigate, and report to the Secretary, complaints of violations;

(c) To make rules and regulations to effectuate its terms and provisions; and

(d) To recommend amendments to the Secretary.

§ 987.22 *Duties.* The market administrator shall perform all duties necessary to administer the terms and provisions of this part, including, but not limited to, the following:

(a) Within 45 days following the date on which he enters upon his duties, or such lesser period as may be prescribed by the Secretary, execute and deliver to the Secretary a bond, effective as of the date on which he enters upon such duties and conditioned upon the faithful performance of such duties, in an amount and with surety thereon, satisfactory to the Secretary;

(b) Employ and fix the compensation of such persons as may be necessary to enable him to administer its terms and provisions;

(c) Obtain a bond in a reasonable amount and with reasonable surety thereon covering each employee who handles funds entrusted to the market administrator;

(d) Pay out of the funds provided by § 987.95, the cost of his bond and of the bonds of his employees, his own compensation, and all other expenses, except those incurred

under § 987.94, necessarily incurred by him in the maintenance and functioning of his office and in the performance of his duties;

(e) Keep such books and records as will clearly reflect the transactions provided for in this part, and, upon request by the Secretary, surrender the same to such other person as the Secretary may designate;

(f) Submit his books and records to examination by the Secretary and furnish such information and reports as may be requested by the Secretary;

(g) Audit all reports and payments by each handler by inspection of such handler's records and of the records of any other handler or person upon whose utilization the classification of skim milk or butterfat for such handler depends;

(h) Publicly announce, at his discretion, unless otherwise directed by the Secretary, by posting in a conspicuous place in his office and by such other means as he deems appropriate, the name of any person who, after the date upon which he is required to perform such acts, has not made reports pursuant to §§ 987.30 and 987.31, or payments pursuant to § 987.90, and §§ 987.93 through § 987.98;

(i) Publicly announce, by posting in a conspicuous place in his office and by such other means as he deems appropriate, and notify each handler in writing:

(1) On or before the 6th day of each month, the minimum price for Class I milk computed pursuant to § 987.51(a) and the Class I butterfat differential computed pursuant to § 987.52(a), both for the current month, and the minimum price for Class II milk computed pursuant to § 987.51(b) and the Class II butterfat differential computed pursuant to § 987.52(b), both for the previous month;

(2) On or before the 10th day after the end of each of the months of August through February, the uniform price computed pursuant to § 987.71, and the butterfat differential computed pursuant to § 987.91; and

(3) On or before the 10th day after the end of each of the months of March through July, the uniform prices for base milk and for excess milk, computed pursuant to § 987.72, and the butterfat differential computed pursuant to § 987.91;

(j) On or before the 12th day after the end of each month, report to each cooperative association which so requests, the percentage of producer milk delivered by members of such association, which was used in each class by each handler receiving such milk. For the purpose of this report, the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by each handler; and

(k) Prepare and disseminate to the public such statistics and such information as he deems advisable and as do not reveal confidential information.

REPORTS, RECORDS, AND FACILITIES

§ 987.30 *Reports of receipts and utilization.* On or before the 6th day after the end of each month, each handler, except a producer-handler, shall report to the market administrator in the detail and on forms prescribed by the market administrator for each of his approved plants for such month as follows:

(a) The quantities of skim milk and butterfat contained in receipts of producer milk; and for the months of March through July, the total quantity of base milk received;

(b) The quantities of skim milk and butterfat contained in fluid milk products received from other pool plants;

(c) The quantities of skim milk and butterfat contained in other source milk;

(d) Inventories of fluid milk products on hand at the beginning and end of the month; and

(e) The utilization of all skim milk and butterfat required to be reported pursuant to this section, including a separate statement of the disposition of Class I milk outside the marketing area.

§ 987.31 *Other reports.* (a) Each producer-handler shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe.

(b) Each handler, except a producer-handler, shall report to the market administrator in detail and on forms prescribed by the market administrator:

(1) On or before the 20th day after the end of the month for each of his fluid milk plants, his producer payroll for such month which shall show for each producer: (i) His name and address; (ii) the total pounds of milk received from such producer, including for the months of March through July, the total pounds of base, and excess milk (iii) the number of days on which milk was received from such producer if less than a full calendar month, (iv) the average butterfat content of such milk, and (v) the net amount of such handler's payment, together with the price paid and the amount and nature of any deductions;

(2) On or before the first day other source milk is received in the form of milk, fluid skim milk, or cream at his pool plant(s), his intention to receive such product, and on or before the last day such product is received, his intention to discontinue receipt of such milk;

(3) On or before the day prior to diverting producer milk pursuant to § 987.13, his intention to divert such milk, the date(s) of such diversion and the nonpool plant to which such milk is to be diverted; and

(4) Such other information with respect to the utilization of butterfat and skim milk as the market administrator may prescribe.

(c) Each handler who receives producer milk for which payment is to be made to a cooperative association pursuant to § 987.90(e) shall report to such cooperative association with respect to each such producer, as follows:

(1) On or before the 20th day of each month, the total pounds of milk received during the first 15 days of the month,

(2) On or before the 10th day after the end of each month:

(i) The daily and total pounds of milk received during the month with separate totals for base and excess milk for the months of March through July, and the average butterfat test thereof; and

(ii) The amount or rate and nature of any deductions.

§ 987.32 *Records and facilities.* Each handler shall maintain and make available to the market administrator during the usual hours of business, such accounts and records of his operations, together with such facilities as are necessary for the market administrator to verify or establish the correct data for each month with respect to:

(a) The receipt and utilization of all skim milk and butterfat handled in any form;

(b) The weights and butterfat and other content of all milk, skim milk, cream, and other milk products handled;

(c) The pounds of skim milk and butterfat contained in or represented by all milk, skim milk, cream, and milk products on hand at the beginning and end of each month; and

(d) Payments to producers, including any deductions authorized by producers, and disbursement of money so deducted.

§ 987.33 *Retention of records.* All books and records required under this part to be made available to the market administrator, shall be retained by the handler for a period of three years to begin at the end of the calendar month, to which such books and record pertain: *Provided,* That if, within such three-year period, the market administrator notifies the handler in writing that the retention of such books and records, or of specified books and records, is necessary in connection with a proceeding under section 8c(15)(A) of the act or a court action specified in such notice, the handler shall retain such books and records, or specified books and records, until further written notification from the market administrator. In either case, the market administrator shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

CLASSIFICATION

§ 987.40 *Skim milk and butterfat to be classified.* All skim milk and butterfat received within the month at pool plants and which is required to be reported pursuant to § 987.30 shall be classified by the market administrator pursuant to the provisions of §§ 987.41 through 987.46.

§ 987.41 *Classes of utilization.* Subject to the conditions set forth in §§ 987.43 and 987.44, the classes of utilization shall be as follows:

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(a) *Class I milk.* Class I milk shall be all skim milk (including concentrated and reconstituted skim milk) and butterfat (1) disposed of in the form of milk, skim milk, buttermilk, flavored milk, flavored milk drinks (including eggnog), yogurt, cream (other than frozen storage cream), cultured sour cream, and any mixture of cream and milk or skim milk (other than ice cream, ice cream mixes, and sterilized products contained in hermetically sealed containers); (2) contained in inventory of milk and milk products designated as Class I milk pursuant to subparagraph (1) of this paragraph, on hand at the end of the month; and (3) not accounted for as Class II milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat (1) used to produce any product other than those designated as Class I milk pursuant to paragraph (a) of this section; (2) disposed of and used for livestock feed; (3) contained in skim milk dumped, provided the market administrator is notified in advance and given opportunity to verify such dumping; and (4) in shrinkage not to exceed 2 percent of skim milk and butterfat, respectively, in producer milk and other source milk.

§ 987.42 *Assignment of shrinkage.* The market administrator shall assign shrinkage at the pool plant(s) of each handler as follows:

(a) Compute the shrinkage of skim milk and butterfat classified as Class II milk; and

(b) Assign the resulting amounts pro rata to the handler's receipts of skim milk and butterfat, respectively, in producer milk and in other source milk.

§ 987.43. *Responsibility of handlers and reclassification of milk.* (a) All skim milk and butterfat shall be Class I milk unless the handler who first receives such skim milk

or butterfat can prove to the market administrator that such skim milk or butterfat should be classified otherwise;

(b) Any skim milk or butterfat shall be reclassified if verification by the market administrator discloses that the original classification was incorrect.

§ 987.44 *Transfers.* Skim milk or butterfat disposed of each month from a pool plant shall be classified:

(a) As follows if transferred in the form of fluid milk products to the pool plant of another handler, except a producer-handler, unless utilization as Class II milk is claimed by both handlers in their reports submitted for the month to the market administrator pursuant to § 987.30, subject in any event to the conditions set forth in subparagraph (3) of this paragraph:

(1) As Class I milk, if transferred from a distributing plant to a pool plant or from a supply plant to a supply plant;

(2) Pro rata to the amounts of skim milk and butterfat, respectively, remaining in each class in the plant(s) of the transferee handler after subtraction pursuant to § 987.46 (a) (5) and the corresponding step of paragraph (b) thereof of any skim milk or butterfat classified pursuant to subparagraph (1) of this paragraph, if transferred from a supply plant to a distributing plant;

(3) (i) In no event shall the skim milk or butterfat assigned to Class II milk exceed the amount thereof remaining in Class II milk in the plant(s) of the transferee handlers after subtraction of other source milk pursuant to § 987.46, and any additional amounts of such skim milk or butterfat shall be classified as Class I milk; and

(ii) If either or both handlers have other source milk during the month, the skim milk or butterfat so transferred

shall be classified at both plants so as to allocate the greatest possible Class I milk utilization to producer milk of both handlers.

(b) As Class I milk if transferred to a producer-handler in the form of fluid milk products;

(c) As Class I milk if transferred or diverted in the form of bulk milk, skim milk, or cream to a non-pool plant, unless the following conditions are met:

(1) The transferring handler claims utilization in a product specified in § 987.41 (b);

(2) The operator of the nonpool plant keeps adequate books and records showing the utilization of all skim milk and butterfat received at such plant, and the market administrator is permitted to audit such books and records for the purpose of verification; and

(3) The Class I milk in the nonpool plant does not exceed the receipts of butterfat and skim milk in milk received during the month from dairy farmers who the market administrator determines are the regular source of supply for such plant: *Provided,* That any Class I milk in excess of receipts from such dairy farmers shall be assigned to milk, cream, or skim milk so transferred or diverted.

§ 987.45 *Computation of the skim milk and butterfat in each class.* For each month, the market administrator shall correct for mathematical and for other obvious errors the reports of receipts and utilization for the pool plant(s) of each handler and shall compute the pounds of butterfat and skim milk in Class I milk and Class II milk for such handler: *Provided,* That if any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk disposed of in such product shall be

considered to be an amount equivalent to the nonfat milk solids contained in such product, plus all of the water originally associated with such solids.

§ 987.46 *Allocation of skim milk and butterfat classified.* (a) The pounds of skim milk remaining in each class after making the following computations each month, with respect to the pool plant(s) of each handler, shall be the pounds of skim milk in such class allocated to the producer milk of such handler for such month:

(1) Subtract from the total pounds of skim milk in Class II milk the pounds of skim milk assigned to producer milk pursuant to § 987.42 (b);

(2) Subtract from the remaining pounds of skim milk in Class II milk the pounds of skim milk in other source milk, except that to be subtracted pursuant to subparagraph (3) of this paragraph: *Provided*, That if the pounds of skim milk in other source milk exceed the remaining pounds of skim milk in Class II milk, an amount equal to the difference shall be subtracted from the pounds of skim milk in Class I milk;

(3) Subtract from the pounds of skim milk remaining in Class II milk, the pounds of skim milk in fluid milk products received from plants regulated pursuant to other orders issued pursuant to the act, less any equivalent amounts of skim milk in other source milk, allocated to Class I milk at each of such plants, respectively: *Provided*, That if the pounds of skim milk to be subtracted exceed the remaining pounds of skim milk in Class II milk, the balance shall be subtracted from the pounds of skim milk in Class I milk;

(4) Subtract from the remaining pounds of skim milk in Class I milk, the pounds of skim milk contained in inven-

tory of fluid milk producers on hand at the beginning of the month;

(5) Subtract from the remaining pounds of skim milk in each class the skim milk contained in fluid milk products received from the pool plants of other handlers, according to the classification of such skim milk as determined pursuant to § 987.44 (a);

(6) Add to the remaining pounds of skim milk in Class II milk the pounds of skim milk subtracted pursuant to subparagraph (1) of this paragraph; and,

(7) If the remaining pounds of skim milk in both classes exceed the pounds of skim milk contained in producer milk, subtract such excess from the remaining pounds of skim milk in series beginning with Class II milk. Any amount so subtracted shall be known as "overage."

(b) Butterfat shall be allocated in accordance with the same procedure outlined for skim milk in paragraph (a) of this section;

(c) Determine the weighted average butterfat content of the Class I and Class II milk allocated to producer milk.

MINIMUM PRICES

§ 987.50 *Basic formula price.* The highest of the prices computed pursuant to paragraphs (a), (b) and (c) of this section, rounded to the nearest whole cent, shall be known as the basic formula price.

(a) Divide the average of the basic or field prices per hundredweight reported to have been paid or to be paid for milk of 3.5 percent butterfat content received from farmers during the month at the following plants or places for which prices have been reported to the market adminis-

trator or to the Department of Agriculture, by 3.5 and multiply by 4.0:

Present Operator and Location

Borden Co., Mount Pleasant, Mich.
Carnation Co., Sparta, Mich.
Pet Milk Co., Hudson, Mich.
Pet Milk Co., Wayland, Mich.
Pet Milk Co., Coopersville, Mich.
Borden Co., Orfordville, Wis.
Borden Co., New London, Wis.
Carnation Co., Richland Center, Wis.
Carnation Co., Oconomowoc, Wis.
Pet Milk Co., New Glarus, Wis.
Pet Milk Co., Belleville, Wis.
White House Milk Co., Manitowoc, Wis.
White House Milk Co., West Bend, Wis.

(b) The price computed by adding together any plus values computed pursuant to subparagraphs (1) and (2) of this paragraph:

(1) Multiply the Chicago butter price by 4.8;

(2) Deduct five cents from the simple average as computed by the market administrator, of the weighted averages of carlot prices per pound of non-fat dry milk solids, spray and roller process, respectively for human consumption, f.o.b. manufacturing plants in the Chicago area, as published for the period from the 26th day of the preceding month through the 25th day of the current month, by the Department of Agriculture, and multiply by 7.5;

(c) The average of the basic or field prices per hundredweight reported to have been paid or to be paid for milk of 4.0 percent butterfat content received from farm-

ers during the month at the following plants or places for which prices have been reported to the market administrator or to the Department of Agriculture:

Present Operator and Location

Kraft Cheese Co., Newton, Miss.
Borden Co., Starksville, Miss.
Carnation Co., Tupelo, Miss.
Brookhaven Creamery, Brookhaven, Miss.
Pet Milk Co., Kosciusko, Miss.

§ 987.51 *Class prices.* Subject to the provisions of §§ 987.52 and 987.53, the minimum prices per hundredweight for the month shall be as follows:

(a) *Class I milk price.* The price per hundredweight for Class I milk for the month shall be the basic formula price for the preceding month, plus $1.85 during the months of March, April, May and June, and plus $2.25 during all other months.

(b) *Class II milk price.* The price per hundredweight for Class II milk shall be the price determined pursuant to § 987.50 (c).

§ 987.52 *Butterfat differential to handlers.* For milk containing more or less than 4.0 percent butterfat, the class prices calculated pursuant to § 987.51 shall be increased or decreased, respectively, for each one-tenth percent butterfat at the appropriate rate determined as follows:

(a) *Class I price.* Multiply the Chicago butter price for the preceding month by 0.12;

(b) *Class II price.* Multiply the Chicago butter price for the month by 0.11.

Appendix B. — Order Provisions
2 — Order Prior To Amendment

§ 987.53 *Location differentials to handlers.* For that milk which is received from producers at a pool plant located outside the marketing area and 50 miles or more from the State Capitol Building, Jackson, Mississippi, by shortest hard-surfaced highway distance, as determined by the market administrator, and which is transfered in the form of fluid milk products to another pool plant and assigned to Class I pursuant to the proviso of this section, or otherwise classified as Class I milk, the price specified in § 987.51 (a) shall be reduced by 10 cents: *Provided,* That for purposes of calculating such location differential, products so designated as Class I milk which are transferred between pool plants shall be assigned to any remainder of Class II milk in the transferee-plant after making the calculations prescribed in § 987.46(a) (1), (2) and (3), and the comparable steps in § 987.46(b) for such plant, and after deducting from such remainder an amount equal to 0.05 times the skim milk and butterfat contained in the producer milk received at the transferee-plant, such assignment to transferor plants to be made first to plants to which the location differential is applicable.

§ 987.54 *Rate of compensatory payments on unpriced milk.* The rate of compensatory payment per hundredweight shall be calculated as follows:

(a) For the months of March through August, subtract the Class II milk price adjusted by the Class II butterfat differential, from the Class I milk price, adjusted by the Class I butterfat differential, and in the case of fluid milk products, by the Class I location differential; and

(b) For the months of September through February, subtract the uniform price to producers fom the Class I milk price.

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APPLICATION OF PROVISIONS

§ 987.60 *Producer-handlers.* Sections 987.40 through 987.46, 987.50 through 987.53, 987.61, 987.62, and 987.70 through 987.72, 987.80 through 987.83, and 987.90 through 987.98 shall not apply to a producer-handler.

§ 987.61 *Plants subject to other Federal orders.* The provisions of this order shall not apply to a plant specified in paragraph (a) or (b) of this section except as follows: The operator of such plant shall, with respect to the total receipts and utilization or disposition of skim milk and butterfat at the plant, make reports to the market administrator at such time and in such manner as the market administrator may require, and allow verification of such reports by the market administrator.

(a) Any distributing plant which would be subject to the classification and pricing provisions of another order issued pursuant to the act unless a greater volume of Class I milk is disposed of during the month from such plant to retail or wholesale outlets (except pool plants) in the Central Mississippi marketing area than in the marketing area regulated pursuant to such other order: *Provided,* That, if such distributing plant disposed of Class I milk during the month in the marketing areas of more than one other Federal order, the marketing area in which the most Class I milk is disposed shall determine the Federal order under the provisions of which such plant shall be regulated.

(b) Any supply plant which would be subject to the classification and pricing provisions of another order issued pursuant to the act unless such plant qualified as a pool plant during each of the preceding months of August through March.

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2 — Order Prior To Amendment

§ 987.62 *Handlers operating nonpool plants.* Each handler who is the operator of a nonpool plant which is not subject to the classification and pricing provisions of another order issued pursuant to the act, shall, on or before the 15th day after the end of each month, pay to the market administrator for deposit into the producer-settlement fund, an amount calculated by multiplying the total hundredweight of butterfat and skim milk disposed of in the form of fluid milk products from such nonpool plant to retail or wholesale outlets (including deliveries by vendors and sales through plant stores) in the marketing area, during the month, by the rate of compensatory payment calculated pursuant to § 987.54.

DETERMINATION OF UNIFORM PRICE

§ 987.70 *Net obligation of handlers.* The net obligation of each handler for producer milk received at his pool plant(s) during each month shall be a sum of money computed by the market administrator as follows: (a) Multiply the pounds of such milk in each class by the applicable class price; (b) add together the resulting amounts; (c) add the amounts computed by multiplying the pounds of overage deducted from each class by the applicable class price; (d) add or subtract, as the case may be, an amount necessary to correct errors discovered by the market administrator in the verification of reports of such handler of his receipts and utilization of skim milk and butterfat for previous months; (e) in the case of a handler operating a pool plant which was not a pool plant under this order during each of the preceding five months, add an amount calculated by multiplying the difference between the Class I and the Class II prices adjusted by the appropriate butterfat

differentials by any figure determined as follows: Any amount by which the hundredweight of skim milk or butterfat in inventory classified for such month, pursuant to § 947.41(a)(2), is less than the least hundredweight of skim milk or butterfat respectively, deducted pursuant to § 987.46(a)(4) and (b) for such handler for any month since such plant was not a pool plant; (f) add for each month of July an amount calculated by multiplying by 40 cents the hundredweight by which the inventory classified pursuant to § 987.41(a)(2) for the preceding month exceeds any inventory so classified for the preceding February; and (g) add an amount computed by multiplying the hundredweight of skim milk and butterfat subtracted from Class I milk, pursuant to § 987.46(a)(2) and (b), by the rate of compensatory payment as determined pursuant to § 987.54, for the nearest plant(s) from which an equivalent amount of other source milk was received in the form of fluid milk products.

§ 987.71 *Computation of the uniform price.* For each of the months of August through February, the market administrator shall compute the uniform price per hundredweight of producer milk of 4.0 percent butterfat content, f.o.b. market as follows:

(a) Combine into one total the values computed pursuant to § 987.70 for the producer milk of all handlers who submit reports prescribed in § 987.30 and who have made payments for the previous month pursuant to § 987.90 or §987.97;

(b) Subtract, if the average butterfat content of the producer milk included under paragraph (a) of this section is greater than 4.0 percent, or add, if such average butterfat content is less than 4.0 percent, an amount computed as follows: Multiply the variation in the average butterfat

content of such milk from 4.0 percent by the butterfat differential computed pursuant to § 987.91, and multiply the result by the total hundredweight of such milk;

(c) Add an amount equal to the sum of the deductions to be made from producer payments for location differentials pursuant to § 987.90(c)(1);

(d) Add an amount equal to one-half of the unobligated balance on hand in the producer-settlement fund;

(e) Divide the resulting amount by the total hundredweight of producer milk included under paragraph (a) of this section; and

(f) Subtract not less than 4 cents nor more than 5 cents.

§987.72 *Computation of uniform prices for base milk and excess milk.* For each of the months of March through July, the market administrator shall compute the uniform prices per hundredweight for base milk and for excess milk, each of 4.0 percent butterfat content, f.o.b. market as follows:

(a) Compute the aggregate value of excess milk for all handlers who submit reports pursuant to § 987.30, and who have made payments for the previous month pursuant to §§ 987.90 or 987.97, as follows: (1) Multiply the hundredweight of such milk not in excess of the total quantity of producer milk assigned to Class II milk in the pool plants of such handlers by the Class II milk price; (2) multiply any additional hundredweight of such milk by the Class I milk price; and (3) add together the resulting amounts;

(b) Divide the aggregate value of excess milk obtained in paragraph (a) of this section by the total hundredweight of such milk, adjust to the nearest cent and subtract 4 cents. The resulting figure shall be the uniform price for excess

milk of 4.0 percent butterfat content received from producers;

(c) Subtract an amount determined by multiplying the uniform price obtained in paragraph (b) of this section, plus 4 cents, times the hundredweight of excess milk from the total value of producer milk for the month as determined according to the calculations set forth in § 987.71(a) through (d);

(d) Divide the result obtained pursuant to paragraph (c) of this section by the total hundredweight of base milk of handlers included in these computations;

(e) Subtract not less than 4 cents nor more than 5 cents from the price computed pursuant to paragraph (d) of this section. The resulting figure shall be the uniform price for base milk of 4.0 percent butterfat content, f.o.b. market.

BASE RATING

§ 987.80. *Determination of daily base.* The daily base of each producer shall be calculated by the market administrator as follows: Divide the total pounds of milk received by all handlers from such producer during the months of September through January by the number of days from the first day milk is received from such producer during said months to the last day of January, inclusive, but not less than 120 days.

§ 987.81. *Computation of base.* The base of each producer to be applied during the months of March through July shall be a quantity of milk calculated by the market administrator in the following manner: Multiply the daily base of such producer by the number of days such producer's milk was received by such handler during the month.

Appendix B. — Order Provisions
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§ 987.82. *Base rules.* The following rules shall apply in connection with the establishment of bases:

(a) A base shall be assigned to the producer for whose account milk is received at a pool plant during the months of September through January;

(b) Bases may be transferred by notifying the market administrator in writing before the last day of any month, for which such base is to be transferred to the person named in such notice only as follows:

(1) In the event of the death, retirement, or entry into military service of a producer, the entire base may be transferred to a member of such producer's immediate family who carries on the dairy operations.

(2) If a base is held jointly and such joint holding is terminated, the entire base may be transferred to one of the joint holders.

(3) The entire daily base of a producer may be moved from one handler to another handler.

§ 987.83 *Announcement of established bases.* On or before March 1 of each year, the market administrator shall notify each producer and the handler receiving milk from such producer of the daily base established by such producer.

PAYMENTS

§ 987.90 *Payments to producers.* Except as provided in paragraph (e) of this section, each handler shall make payment to each producer from whom milk is received during the month as follows:

(a) On or before the last day of each month, for milk received during the first 15 days of the month, at not less

than the price per hundredweight for Class II milk for the preceding month;

(b) On or before the 15th day after the end of each of the months of August through February for milk recieved during such month at not less than the uniform price per hundredweight, computed for such handler pursuant to § 987.71, subject to the butterfat differential computed pursuant to § 987.91 and the location differential computed pursuant to § 987.92, less proper deductions authorized in writing by such producer and less payment made pursuant to paragraph (a) of this section, and deductions made pursuant to § 987.94;

(c) On or before the 15th day after the end of each of the months of March through July, after allowance for the amount of payment made pursuant to paragraph (a) of this section for deductions made pursuant to § 987.94, and for other proper deductions authorized in writing by such producer, as follows:

(1) At not less than the uniform price per hundredweight for base milk computed pursuant to § 987.72 for the quantity of base milk received from such producer during the month, subject to the butterfat differential computed pursuant to § 987.91 and the location differential computed pursuant to § 987.92;

(2) At not less than the uniform price per hundredweight for excess milk computed pursuant to § 987.72 for the quantity of excess milk received from such producer during the month, subject to the butterfat differential computed pursuant to § 987.91 and the location differential computed pursuant to § 987.92;

(d) In making the payments to producers pursuant to paragraphs (b) and (c) of this section, each handler shall

furnish each producer from whom he has received milk with a supporting statement in such form that it may be retained by the producer, which shall show for each month:

(1) The month and the identity of the handler and of the producer;

(2) The daily and total pounds and the average butterfat content of milk received from such producer:

(3) The minimum rate or rates at which payment to such producer is required pursuant to this part;

(4) The rate which is used in making the payment, if such rate is other than the applicable minimum rate;

(5) The amount or the rate per hundredweight and nature of each deduction claimed by the handler; and

(6) The net amount of payment to such producer.

(e) In lieu of payments pursuant to paragraphs (a), (b) and (c) of this section, each handler shall make payments to a cooperative association which has filed a written request for such payment with such handler and with respect to producers for whose milk the market administrator determines that such cooperative association is authorized to collect payment, as follows:

(1) On or before the 26th day of each month, an amount equal to not less than the Class II price for the preceding month, multiplied by the hundredweight of milk received and
during the first 15 days of the month from such producers;

(2) On or before the 13th day after the end of each month an amount equal to not less than the applicable uniform price(s) pursuant to §§ 987.71 and 987.72, multiplied by the hundredweight of milk received from such producers to which each such price is applicable, subject to the butterfat differential computed pursuant to § 987.91 and the loca-

tion differential computed pursuant to § 987.92, less payment made such cooperative association pursuant to subparagraph (1) of this paragraph, and proper deductions authorized in writing by such producers or such cooperative associations.

(f) On or before the 13th day after the end of the month, each handler shall pay to each cooperative association which is also a handler, for milk received from it not less than the value of such milk as classified pursuant to § 987.44(a) at the applicable respective class prices, including differentials prescribed by the order.

§ 987.91 *Butterfat differential to producers.* The applicable uniform prices to be paid each producer pursuant to § 987.90 shall be increased or decreased for each one-tenth of one percent which the butterfat content of his milk is above or below 4.0 percent, respectively, at the rate determined by multiplying the pounds of butterfat in producer milk allocated to Class I and Class II milk pursuant to § 987.46(b), by the respective butterfat differential for each class, dividing the sum of such values by the total pounds of such butterfat and rounding the resultant figure to the nearest half cent.

§ 987.92 *Location differentials to producers.* In making payment to producers pursuant to § 987.90, the applicable uniform prices to be paid for producer milk received at a pool plant located outside the market area and more than 50 miles from the State Capitol Building in Jackson, Mississippi, by the shortest hard-surfaced highway distance, as determined by the market administrator, shall be reduced 10 cents per hundredweight.

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§ 987.93 *Adjustments of accounts.* Whenever audit by the market administrator of any handler's reports, books, records, or accounts, or verification of weights and butterfat tests of milk or milk products discloses errors resulting in money due (a) market administrator from a handler, (b) a handler from the market administrator, or (c) any producer or cooperative association from a handler, the market administrator shall promptly notify such handler of any amounts so due and payment thereof shall be made on or before the next date for making payments set forth under which such error occurred.

§ 987.94 *Marketing services.* (a) Except as set forth in paragraph (b) of this section, each handler, in making payments to producers for milk (other than milk of his own production) pursuant to § 987.90, shall deduct 7 cents per hundredweight, or such amount not exceeding 7 cents per hundredweight, as may be prescribed by the Secretary, and shall pay such deductions to the market administrator on or before the 15th day after the end of each month. Such moneys shall be used by the market administrator to provide market information and to check the accuracy of the testing and weighing of their milk for producers who are not receiving such service from a cooperative association:

(b) In the case of producers who are members of a cooperative association which the Secretary has determined is actually performing the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made to such producers as may be authorized by the membership agreement or marketing contract between such cooperative association and such producers on or before the 15th day after the end of

each month, and pay such deductions to the cooperative association of which such producers are members, furnishing a statement showing the amount of any such deductions and the amount and average butterfat test of milk received from each such producer. In lieu of such statement, a handler may authorize the market administrator to furnish such cooperative association the information reported for such producers pursuant to § 987.90(d).

§ 987.95 *Expense of administration.* As his pro rata share of the expense of administration of this part, each handler shall pay to the market administrator on or before the 15th day after the end of the month, for such month, 5 cents per hundredweight, or such amount not exceeding 5 cents per hundredweight, as the Secretary may prescribe, with respect to all (a) receipts of producer milk, including such handler's own production; (b) other source milk allocated to Class I milk pursuant to § 987.46(a)(2) and (b); and (c) Class I milk disposed of in the marketing area (except to a pool plant) from a nonpool plant not subject to the classification and pricing provisions of another order issued pursuant to the Act.

§ 987.96 *Producer-settlement fund.* The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 987.62, 987.93 and 987.97, and out of which he shall make all payments pursuant to §§ 987.93 and 987.98: *Provided*, That any payments due to any handler shall be offset by any payments due from such handler.

§ 987.97 *Payments to the producer-settlement fund.* On or before the 12th day after the end of each month, each

handler shall pay to the market administrator any amount by which the value of his producer milk as computed pursuant to § 987.70 for such month, is greater than the amount owed by him for such milk at the appropriate uniform price(s) adjusted by the producer butterfat and location differentials.

§ 987.98 *Payments out of the producer-settlement fund.* On or before the 13th day after the end of each month, the market administrator shall pay to each handler any amount by which the total value of his producer milk, computed pursuant to § 987.70, for such month is less than the amount owed by him for such milk at the appropriate uniform price(s) adjusted by the producer butterfat and location differentials. If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the appropriate funds are available.

§ 987.99 *Termination of obligations.* The provisions of this section shall apply to any obligation under this part for the payment of money.

(a) The obligation of any handler to pay money required to be paid under the terms of this part shall, except as provided in paragraphs (b) and (c) of this section, terminate two years after the last day of the calendar month during which the market administrator receives the handler's utilization report on the milk involved in such obligation, unless within such two-year period the market administrator notifies the handler in writing that such money is due and payable. Service of such notice shall be complete upon mailing to the handler's last known address, and it

shal contain but need not be limited to, the following information:

(1) The amount of the obligation;

(2) The month(s) during which the milk, with respect to which the obligation exists, was received or handled; and

(3) If the obligation is payable to one or more producers or to an association of producers, the name of such producer(s) or association of producers, or if the obligation is payable to the market administrator, the account for which it is to be paid.

(b) If a handler fails or refuses, with respect to any obligation under this part, to make available to the market administrator or his representatives all books and records required by this part to be made available, the market administrator may, within the two-year period provided for in paragraph (a) of this section, notify the handler in writing of such failure or refusal. If the market administrator so notifies a handler, the said two-year period with respect to such obligation shall not begin to run until the first day of the calendar month following the month during which all such books and records pertaining to such oligation are made avaliable to the market administrator or his representatives.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under this part to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed.

(d) Any obligation on the part of the market administrator to pay any handler any money which such handler claims to be due him under the terms of this part shall

terminate two years after the end of the calendar month during which the milk involved in the claim was received if an underpayment is claimed, or two years after the end of the calendar month during which the payment (including deduction or set-off by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable period of time, files, pursuant to section 8c(15)(A) of the act, a petition claiming such money.

EFFECTIVE TIME, SUSPENSION, OR TERMINATION

§ 987.100 *Effective time.* The provisions of this part or any amendment to this part shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated pursuant to § 987.101.

§ 987.101 *Suspension or termination.* The Secretary may suspend or terminate this part or any provision of this part whenever he finds this part or any provision of this part obstructs or does not tend to effectuate the declared policy of the act. This part shall terminate, in any event, whenever the provisions of the act authorizing it cease to be in effect.

§ 987.102 *Continuing obligations.* If, upon the suspension or termination of any or all provisions of this part, there are any obligations thereunder, the final accrual or ascertainment of which requires further acts by any person (including the market administrator), such further acts shall be performed notwithstanding such suspension or termination.

§ 987.103 *Liquidation.* Upon the suspension or termination of the provisions of this part, except this section,

the market administrator, or such liquidating agent as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office, dispose of all property in his possession or control, including accounts receivable, and execute and deliver all assignment or other instruments necessary or appropriate to effectuate any such disposition. If a liquidating agent is so designated, all assets, books, and records of the market administrator shall be transferred promptly to such liquidating agent. If, upon such liquidation, the funds on hand exceed the amounts required to pay outstanding obligations of the office of the market administrator and to pay necessary expenses of liquidating and distribution, such excess shall be distributed to contributing handlers and producers in an equitable manner.

§ 987.110 *Agents.* The Secretary may, by designation in writing, name any officer or employee of the United States to act as his Agent or Representative in connection with any of the provisions of this part.

§ 987.111 *Separability of provisions.* If any provision of this part, or its application to any person or circumstances is held invalid, the application of such provision and of the remaining provisions of this part, to other persons or circumstances shall not be affected thereby.

Issued at Washingtong, D.C., this 27th day of March 1956, to be effective on and after April 1, 1956.

[SEAL] TRUE D. MORSE,
Acting Secretary.

APPENDIX C.

Recommended Decision

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULURE

(Received — Apr. 3, 1959)

In re	)	AMA Docket No. 87-3
Vance Dairy,	)	
Petitioners	)	Recommended Decision

Preliminary Statement

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), involving the validity of provisions of Order No. 87 (7 CFR Part 987), which regulates milk handling in the Central Mississippi milk marketing area. The proceeding was instituted by a petition filed on September 30, 1957, by L. B. Vance and Ford Vance, partners operating as Vance Dairy, a milk dealer of Hattiesburg, Mississippi. Petitioners allege that a definition put into Order No. 87 in 1957, which results in their having to make equalization payments on milk of their own production, is not authorized by the Act and illegally discriminates against them, and that their business is not subject to the Order because it is wholly intrastate. The respondent, the Agricultural Marketing Service, United States Department of Agriculture, filed an answer on October 17, 1957, in effect denying any invalidity in the Order as it applies to petitioners. On September 22, 1958, the proceeding was assigned to Hearing Examiner Jack W. Bain, who set the oral hearing for Hattiesburg on September 30, 1958, a time and place satisfactory to both parties.

The oral hearing was held before the examiner at the designated time and place. Alfred Moore, of Hattiesburg,

Mississippi, appeared as counsel for petitioners, and Joseph A. Walsh, of the Office of the General Counsel, United States Department of Agriculture, as counsel for respondent. Petitioners called three witnesses, respondent called one, nine exhibits were admitted, official notice was taken of a number of items, and the hearing record on which the definition here in question was based was incorporated by reference. Petitioners offered to prove that the petition asking for the definition was circulated by their competitors, and that competitors brought out a brand of milk at 38 cents a half gallon after the definition became effective, for the purpose of forcing petitioners into bankruptcy. Upon respondent's objection, the receipt of evidence on this matter was refused.

After the hearing the parties submitted briefs, the last of which was filed on February 2, 1959. In their briefs, the parties presented arguments in support of the contentions expressed in the petition and answer, but neither party proposed any finding of fact, conclusion, or order, although briefs "in support thereof" are the briefs authorized by the rules of practice.

Proposed Findings of Fact

1. Vance Dairy is a partnership composed of the respondents herein, L. B. Vance and Ford Vance. The partnership operates a farm, of which it owns about 395 acres and leases 256 more, near Hattiesburg, in Forrest County, Mississippi, upon which it produces milk from cows owned by it, and processes the milk in facilities owned by it, for sale by it to consumers. It keeps one set of records for the entire operation, not separating costs, profits, etc., between producing, processing, and distributing milk.

2. As of April 1, 1956, Order No. 87 contained the following defiintion:

"p. 987.16 *Producer-handler.* 'Producer-handler' means any person who operates a dairy farm and a distribution plant which, during the month, has no other source milk (except own production) or producer milk."

3. The partnership of petitioners formerly bought milk from other producers, as well as using its own production, for processing and sale. About 1956, it stopped taking milk from other producers, and began obtaining all it needed above its own production from regulated "pool" handlers, in order to come within the definition quoted in Finding 2.

4. As of April 1, 1956, Section 987.60 of Order No. 87 exempted a "producer-handler" from certain provisions of the Order, including the requirements of accounting to the producer settlement fund and paying the administrative assessment.

5. On January 19, 1957, a notice of hearing signed by "Roy W. Lennartson, Deputy Administrator," was published in the Federal Register (22 F.R. 417), setting a hearing for January 25, 1957, in Jackson, Mississippi, to consider the following proposals:

"Proposed by Mississippi Milk Producers' Association, Jackson, Mississippi:

"1. Delete p. 987.16 and substitute the following:

"p. 987.16 *Producer-handler.* A producer-handler is any handler who produces milk and operates an approved plant, and who receives no milk from other producers or other approved plants or from a cooperative association and who disposes of less than a daily average of 3,300 pounds of Class I milk through routes in the marketing area during the month.

"2. As an alternative to Proposal No. 1, amplify the present 'producer-handler' provision to further limit the sources from which a producer-handler may receive milk.

"Proposed by the Dairy Division, Agricultural Marketing Service:

"3. Make such changes as may be required to make the entire marketing agreement and order, as amended, conform with any amendments thereto which may result from this hearing."

6. Pursuant to the notice mentioned in Finding 5, a hearing (hereinafter called the 1957 amendment hearing) was held in Jackson, Mississippi, on January 25, 1957. The transcript of the hearing contained 94 pages, five witnesses testified, and five exhibits were admitted in evidence.

7. At the 1957 amendment hearing:

(a) John D. Nord, the Market Administrator for Order No. 87, presented exhibits showing market statistics, a list of producer-handlers in the market, total production of producer-handlers for May through September 1956, etc. He testified that the total quantity of milk other than their own production used by producer-handlers was relatively small, that Vance Dairy was a fully regulated handler in March 1956 and became a producer-handler in April 1956, that Boyles Dairy became a producer-handler in May 1956, and that if any producer-handler had used any "other source milk" he would have become a fully regulated handler.

(b) W. L. Maxey, Jr., Secretary-Manager of Mississippi Milk Producers Association, testified that a producer-handler who produces his entire supply carries his own surplus, but if he buys milk from pool plants, the producers shipping to that pool plant carry the producer-handler's sur-

plus, while his own production is always Class I; one who produces his entire supply should be exempt, but when one becomes a large commercial distributor, then he should share in carrying the surplus as do other handlers; if a large commercial distributor has some production of his own, his milk should come to the plant on the same terms as that of his other producers; fully regulating one who uses other milk puts him on equal terms with other handlers and at the same time distributes the surplus burden among all producers; now, one who receives a substantial portion of his distribution from others can qualify as a producer-handler.

(c) G. R. Worthington, Sr., a long-time producer-handler of Golden Guernsey milk on an 853 acre farm, testified that a producer-handler should be limited to his own production, but there should be no limit upon the daily quantity distributed; that the limit proposed would eliminate producer-handlers; that a producer-handler requires an investment of $75,000 to $100,000 more than a plain producer; that true producer-handlers should be exempt, as they are needed as a balance wheel to prevent monopoly by large interests.

(d) H. F. McWilliams, Jr., of Hattiesburg Creamery, a handler since the beginning of Order No. 87, testified that in October 1956 his firm joined in a petition to change the definition submitted by 18 of the 21 Order No. 87 handlers and three producer cooperatives; that a producer-handler is basically one who distributes his own production only, as in the original Order No. 87; that the proposed quantity limit would not restrict any true producer-handler; that a producer-handler does not hurt the market so long as he handles his own production only; and that the market administrator's authority to examine records of producer-handlers should be clarified.

(e) Elmer C. Tutor, of Grenada Farms, Inc., a handler not then regulated, who testified as opposed to the proposals,

after the preceding witnesses testified as in favor of them, said that the Federal Government had no right to regulate a producer-handler, who had a right to his separate little pool just as a producers' association; that if a producer-handler purchased as much as one pound of other milk he was a handler, not a producer-handler, and should be treated like other handlers; that the definition should not be changed, but if it were, there should be no quantity limitation. (The transcript does not show that this witness was sworn, but for present purposes this does not seem important.)

8. After the 1957 amendment hearing, Vance Dairy filed a brief contending that the proponents of the amendment had not met the burden of showing that the amendment was necessary, that the change would increase the surplus because producer-handlers would raise their own production to meet their entire needs, and that no quantity limit should be applied; East Central Dairies filed an objection to any change; and Harrisburg Creamery and Pet Dairy Products Company filed a joint brief supporting the proposal, stating that it was necessary and that there was no dispute concerning the desirability of limiting a producer-handler to his own production.

9. On March 12, 1957, a recommended decision was published in the Federal Register (22 F.R. 1589), in which the Agricultural Marketing Service recommended that the definition should be amended; that there was no opposing testimony except as to the quantity limitation; that a quantity limitation was not necessary to accomplish the purpose; that no disruption was caused by one who distributed his own production only; that disruption was caused by a producer-handler who got additional milk from pool handlers without pooling all of his Class I utilization, as this made

the pool plants carry the entire surplus without sharing the entire Class I utilization; that one who handles only his own production carries his own surplus; and that the definition should be amended to read:

> "p. 987.16 *Producer-handler.* 'Producer-handler' means any person who operates a dairy farm and a distributing plant which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant."

10. Vance Dairy filed exceptions to the recommended decision, alleging that the evidence did not support it, and that it would take from those energetic and industrious enough to distribute their own milk, and give to those unable to build their own processing plant.

11. On March 28, 1957, a decision was published in the Federal Register (22 F.R. 2049), in which an Assistant Secretary of Agriculture adopted the issues, findings, and conclusions of the recommended decision. (Finding 9).

12. On March 30, 1957, an order was published in the Federal Register (22 F.R. 2121), in which the Acting Secretary promulgated the amendment recommended (Finding 9), effective April 1, 1957, two days later. This is the definition complained of by the petitioners in this proceeding.

13. After April 1, 1957, the partnership of petitioners continued to buy milk above its own production from pool handlers (see Finding 3), which prevented it from coming within the amended definition (Finding 9), and made the exemptions of Section 987.60 of the Order (Finding 4) inapplicable to it.

14. After April 1, 1957, the market administrator computed the use value of the milk handled by petitioners as he did for other handlers, by applying Order class prices to

the quantities of milk used by petitioners in the different classes, applying the uniform or blend price to the total quantity of petitioners' disposal of milk, ascertaining the difference between the two sums, and billing or crediting petitioners accordingly for such difference, for their account with the producer settlement fund. He also applied the prescribed rate for the administrative assessment to petitioners' total disposition, and billed them accordingly.

Proposed Conclusions

Petitioners argue that the Act gives no authority to regulate milk produced by a handler, principally because a producer is not subject to regulation, and the handler does not "purchase" the milk from himself. We need not discuss the arguments of the parties on this, for it is well settled for us that own production is subject to regulation. *In re Acme Breweries, Inc.*, 9 A.D. 1418 (1950), affirmed, *Acme Breweries* v. *Brannan*, 109 F. Supp. 116 (DCND Calif., 1952); *In re Sunflower Dairy, Inc.*, 15 A.D. 1 (1956); *In re Jacob Tanis*, 17 A.D. 1091 (1958); *In re Benbush Dairy*, 17 A.D. 1185 (1958).

Petitioners contend that the proponents at the 1957 amendment hearing failed to present evidence to support their proposals. We think the evidence outlined in Finding 7 is adequate to support the amendment of the definition. It should be borne in mind that Finding 7 itself is not the test of whether the evidence is adequate. That finding is only an outline or summary, and is not intended to be complete in all details. It is the evidence in the 1957 amendment hearing record which is decisive, not any characterization or brief of that evidence which we make here. With only 94 pages of transcript, and with only the one issue involved, we think any reviewing authority will consider the entire

record, and not depend upon what might be excerpted or summarized from that record here.

Petitioners assert that the amendment record shows no evidence of inequities at the time of the hearing. It is shown that producer-handlers were getting milk from pool plants, which resulted in the pool producers carrying the surplus for producer-handlers without sharing in the Class I with which the surplus was associated. Mentioning this inequity is not saying that there was no other, and we definitely do not hold that it is necessary to show a presently existing inequity to support an amendment of a milk order.

Petitioners say that no material benefit to producers was shown, but only a harsh burden to petitioners. A more equal sharing of the necessary surplus of a milk market might well be considered a material benefit to producers. As petitioners were not making equalization payments before the amendment, they may consider paying them a harsh burden. On the other hand, producers who shared the market surplus by taking a blend price, and handlers who competed against petitioners while paying the expense of administering the Order, may feel that old burdens have been lightened rather than a new one created.

Petitioners' argument that the amendment will increase the surplus because producer-handlers will enlarge their production to meet all their needs is based upon an assumption contradicted by testimony that petitioners' own production has been dropping since 1957 (Tr. p. 39). Even if the assumption were proved, however, that might be an argument against the desirability of the definition in a proceeding to amend it, but would not show it to be illegal in this 15-A proceeding. Their argument that their purchase of pool milk at the Class I price reduces the market surplus fails to take into account the fact that someone had to carry a

surplus at some time so that there would be milk available when petitioners wanted it.

Petitioners claim that the provision is discriminatory against them because they must pay into a pool from which they can receive no benefit, and because other producer-handlers (those who meet the definition because they handle only their own production) are not required to equalize their own production while petitioners are.

In saying they can receive no benefit from the pool, petitioners overlook the fact that the pool is a means of sharing the surplus, and helps to carry the surplus necessary to have Class I milk available to them when they need it. By sharing the surplus through the pool, petitioners *as producers* are treated the same as other producers, and by paying into the pool *as handlers* when their Class I use is higher than the market average, they are treated the same as other handlers. If they were favored in either of their capacities, this might well be discriminatory against other producers and other handlers. Furthermore, the fact that regulation causes economic loss to one regulated, not shared by others, does not constitute unlawful discrimination. *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944).

The evidence at the 1957 amendment hearing (Finding 7) supports the promulgation finding (Findings 9 and 11 in this proceeding) that one who handles only his own production (thus meeting the definition in question) carries his own surplus, whereas one in petitioners' position does not, and fully justifies different treatment of those in the two different situations.

Petitioners say they are not subject to Federal regulation because their operation is entirely intrastate. In the decision by the Acting Secretary of Agriculture to promulgate Order No. 87, published in the Federal Register for Septem-

ber 9, 1954 (19 F.R. 5820, 5821-5822), it was found that milk to be regulated by the Order was in and directly affected interstate commerce, and one item mentioned was that milk bottled in New Orleans, Louisiana, was sold in stores in Forrest County, Mississippi. Official notice was taken of this decision at the hearing in this proceeding (Tr. p. 15). Petitioners have presented nothing which would invalidate these findings, and we consider them binding on the interstate commerce question here, leaving petitioners subject to regulation by the Order.

Petitioners' claim that the definition was changed as the result of a scheme by their competitors, for the purpose of harming petitioners, is one rather for an amendment hearing, legislative in character, than for this judicial type of hearing under Section 608c (15)(A) of the Act. We surely could not say here that competitors of regulated handlers should not participate in the process of amending regulation affecting handlers. Whether any action of proponents of amendment, or participants in any part of the hearing process, are questionable would seem to be a matter to be considered in arriving at the decision in that hearing, or in another similar hearing called to correct any improper result of the questionable conduct. The evidence proffered on this question in this proceeding was properly excluded. A decision published on July 15, 1958 (23 F.R. 5343), officially noticed in this proceeding (Tr. p. 14), indicates that a proposal to change the definition in a later amendment proceeding was denied, but the decision does not disclose who made the proposal.

We conclude that Section 987.16 of Order No. 87 is in accordance with law as against the attacks made against it in this proceeding. Of course, any arguments, requests, etc., inconsistent with this conclusion are denied or over-

ruled, whether or not specifically mentioned herein. Accordingly, the petition herein, and this proceeding, should be dismissed and the relief requested should be denied.

Proposed Order

The relief requested herein by petitioners is denied, and the petition herein and this proceeding are dismissed.

Copies hereof shall be served on the parties or their counsel of record, and on the Market Administrator for Order No. 87.

Note: The foregoing is the recommended decision of the examiner, called the "Examiner's Report" in the rules of practice. It is not a final order. The final order will be issued by the Judicial Officer after the parties have had opportunity to file exceptions, etc., as provided by the rules of practice.

The parties will have until April 23, 1959, to file exceptions to this decision, briefs on the exceptions, and requests for oral argument.

/s/ *JACK W. BAIN*
Jack W. Bain
Hearing Examiner

April 3, 1959.

APPENDIX D.

Exceptions Of Vance Dairy, to Hearing Examiner Recommended Decision

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

(Received — Apr. 21, 1959)

In re)
Vance Dairy) AMA Docket No. 87-3
Petitioners)

EXCEPTIONS OF VANCE DAIRY TO PROPOSED CONCLUSIONS OF JACK W. BAIN, HEARING EXAMINER

Come now L. B. Vance and Ford Vance, Partners, doing business as Vance Dairy, and except to the Proposed Conclusions of Jack W. Bain, Hearing Examiner, in the Proposed Conclusions bearing date of April 3, 1959, in the above styled and numbered cause.

1. Petitioners except to that part of the Proposed Conclusions wherein it is stated: "... for it is well settled for us that our production is subject to regulation."

2. Petitioners except to that part of Proposed Conclusions on page 11, specifically, wherein it is shown that on September 9, 1954, that milk bottled in New Orleans, Louisiana was sold in stores in Forrest County, Mississippi. It is submitted that the record in this case does not disclose that the Petitioners in this matter sold any of their milk in interstate commerce, and no where was any attempt made by the Respondent, or any one else, to show that at this time there is other milk being sold in the same area of the Petitioners that is handled and shipped in interstate commerce, or that the small operation of Petitioners is a burden on interstate commerce.

Appendix D. — Exceptions of Vance Dairy to Hearing Examiner — Recommended Decision

3. These Petitioners further except to page 10, wherein it is stated that the amendment will increase the surplus because the producer-handlers will enlarge their production to meet all their needs is contradicted by testimony that Petitioners own production has been dropping since 1957. It is respectfully submitted that it was but a natural consequence that Petitioners own production would have to drop when such a penalty as the one here imposed was imposed upon Petitioners, or, in the alternative, they would have to limit their operation to such an extent that they would not need any extra milk whatsoever. It is respectfully submitted that it is now almost two years since this Petition was filed, and during this entire length of time these Petitioners have not known what their rights were in the matter, waiting for a hearing and decision by the Department. And it is respectfully submitted that in the Petition one of the reliefs sought by the Petitioners is to ascertain as a matter of law whether or not, if their own production was increased to such an extent that it would not be necessary for them to purchase any additional milk from a regulated pool plant, or any other source, this order could and would be amended so as to cause their increased own farm production to be placed in the pool and required to make the penalty payments complained of. It is respectfully submitted that in the conclusions and order that this part of the Petition has not been answered in any manner, and it is further respectfully submitted that since it was contained in the Prayer of the Petition, that the Petitioners are entitled to a decision and order on this particular point.

4. Petitioners particularly except to the ruling of the Hearing Examiner wherein they were not permitted to offer

evidence on the hearing; that the Petition to Amend the Order, and thereby place a penalty on these Petitioners, was circulated by their competitors, and that the whole plan and the whole scheme of the marketing plan of the Department of Agriculture was used by competitors of these Petitioner in an effort to inflict hurt and injury upon these Petitioners.

Without further attempting to set out any particulars wherein the proposed conclusion and order of the Hearing Examiner are excepted to, these Petitioners respectfully submit that they except to the entire findings and the entire order, as they are not supported by the law, nor the facts, and should not be the findings and conclusions of the Hearing Examiner.

Respectfully submitted,

VANCE DAIRY, A Partnership composed of L. B. Vance and Ford Vance

By /s/ L. B. Vance
L. B. Vance, Partner

/s/ Ford Vance
Ford Vance, Partner

Alfred Moore,
Attorney for Petitioners,
First Federal Building,
Hattiesburg, Mississippi

APPENDIX E.

Decision of Judicial Officer of the Department of Agriculture

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re	)	AMA Docket No. 87-3
L. B. Vance and Ford Vance, d/b/a Vance Dairy,	)	
Petitioners	)	Decision and Order.

Preliminary Statement

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*), involving the validity of a provision of Order No. 87, as amended (7 CFR 987.1 *et seq.*), issued under the act and regulating the handling of milk in the Central Mississippi marketing area. Petitioners are partners doing business as a handler under the order and operate a plant subject thereto.

Order No. 87 contains a scheme whereby each handler pays for milk subject to regulation under the order at class values or prices, differing according to the use he makes of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by all handlers under the order. Each handler pays his producers at the uniform price and then, through adjustments with the producer-settlement fund kept by the market administrator, brings the total he has paid to producers up to (by paying money into the producer-settlement fund) or down to (by receiving money from such fund) the total he

is required to pay at class prices. In effect, a handler receives from the producer-settlement fund the amount by which the value of his milk at the class prices is less than the value at the blend price and pays into the producer-settlement fund the amount by which the value of his milk at the class prices exceeds the value at the blend price.

Petitioners complain of section 987.16 of the order containing the definition of "producer-handler." The order provides, except as to certain producer-distributors, for the equalization of milk produced by handlers with the milk of other producers. Petitioners protest their exclusion from "producer-handler" status under the order and allege that the inclusion in the equalization pool, with specified exceptions, of the milk production of producer-dealers, that is, producers who also distribute milk, is invalid. Petitioners contend that section 987.16 is not authorized by the act, is not supported by substantial evidence in the promulgation hearing and is discriminatory and confiscatory. An answer to the petition was filed October 17, 1957, by the Acting Deputy Administrator, Agricultural Marketing Service, United States Depatrment of Agriculture. The answer upheld the validity of the disputed provision and the charges to the petitioners resulting therefrom.

A hearing was held September 30, 1958, in Hattiesburg, Mississippi, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture. Petitioners were represented by Alfred Moore, Attorney at Law, Hattiesburg, Mississippi, and respondent was represented by Joseph A. Walsh, Office of

the General Counsel, United States Department of Agriculture. After the hearing, the parties filed briefs. On April 3, 1959, the hearing examiner issued a report containing proposed findings of fact and conclusions and recommending that the petition be dismissed. Petitioners filed exceptions to the hearing examiner's report.

Findings of Fact

1. Petitioners, L. B. Vance and Ford Vance, are partners doing business as Vance Dairy whose address is Route 7, Hattiesburg, Forrest County, Mississippi. Petitioners operate a dairy farm at that address and process the milk produced thereon and other milk at a plant located on such property for sale to consumers.

2. Effective April 1, 1956, section 987.16 of Order No. 87 read as follows:

> "p. 987.16 Producer-handler. *'Producer-handler'* means any person who operates a dairy farm and a distributing plant which, during the month, has no other source milk (except own production) or producer milk."

Prior to April 1, 1956, petitioners purchased a relatively substantial volume of milk from other producers for processing and sale together with milk of their own production. On or about this date, petitioners ceased purchasing milk from other producers and instead acquired additional milk from pool plants regulated under the order. This change of operations enabled petitioners to operate as a producer-handler under the order and to be exempt from certain order requirements, including equalization of milk produced by them with the milk of other producers and administrative assessments.

Appendix E. — Decision of Judicial Officer of the Department of Agriculture

3. Pursuant to a notice issued January 17, 1957 (22 F.R. 417), a public hearing was held January 25, 1957, in Jackson, Mississippi, on a proposed amendment to the producer-handler definition (section 987.16) contained in the order regulating the handling of milk in the Central Mississippi marketing area. Upon the basis of the evidence introduced at the hearing, the Deputy Administrator, Agricultural Marketing Service, issued a recommended decision March 7, 1957 (22 F. R. 1589), and time was given to file exceptions. Petitioners filed exceptions thereto. A decision by the Assistant Secretary of Agriculture was filed March 25, 1957 (22 F.R. 2049). The decision approved and adopted as the issues, findings and conclusions, and general findings of the decision the material issues, findings, and conclusions of the recommended decision which read, in pertinent part, as follows: [1]

"1. The definition of "producer-handler" should be amended. The Mississippi Milk Producers' Association proposed that the present definition of producer-handler be amended so as to limit the status of producer-handler to persons whose sole source of supply is their own production.

Testimony in support of the proposal was also submitted by a regulated handler. An unregulated handler and a producer-handler testified in favor of the proposal, except as it pertained to a proposed specified volume limit on Class I distribution in the marketing area by a producer-handler. Otherwise, no opposition testimony was offered.

1/ See pages 1-94 and exhibits 3 and 4 of the January 25, 1957, hearing for evidence in support of the findings and conclusions contained in the decision.

Appendix E. — Decision of Judicial Officer of the Department of Agriculture

The producers' association contended that the present language of the producer-handler definition results in price inequities among producer-handlers who are not regulated by Order No. 87, and handlers who are regulated. Proponents testified that a producer-handler should be exempt from regulation if he bottles and distributes milk only of his own-farm production. * * *

There is no evidence that the volume of own-farm production now being distributed by produre--handlers is disrupting marketing conditions in the Central Mississippi area. Rather, the disruptive conditions complained of are due primarily to purchases by producer-handlers of supplemental supplies of milk from pool plants, without pooling all of their Class I utilization. The market instability complained of became acute when certain handlers who had been regulated adjusted their operations to acquire producer-handler status under the order.

The present provisions permit a person who bottles and distributes fluid milk to regulate his purchases of milk in such a way that own-farm production, supplemented by purchases from pool plants is approximately equal to his Class I utilization. Under such circumstances, producers who ship milk to a pool plant carry the entire burden of surplus milk from the producer-handlers operation without sharing in the entire Class I utilization of such plant. In other words, the only producer-handler Class I utilization presently shared by all producers is limited to the quantity of supplemental milk which the producer-handler purchases from a pool plant. If a producer-handler produces all of his own milk needs, he carries his own surplus.

Appendix E — Decision of Judicial Officer of the Department of Agriculture

If the present difinition, which provided that a producer-handler may not retain his exemption from the pooling requirements of the order and use other source milk were expended so as to put a similar limit on the use of milk from pool plants, then bottling plants in the Central Mississippi area which have recently acquired producer-handler status would be placed on a more competitive basis with fully regulated milk plants. It would also distribute the burden of surplus milk among producers more equitably. * * *"

4. The order amending Order No. 87, as amended, was issued March 28, 1957 (22 F.R. 2121), to be effective April 1, 1957. The amending order reads, in pertinent part, as follows:

"1. Delete p. 987.16 and substitute the following:

"p. 987.16 *Producer-handler.* 'Producer-handler' means any person who operates a dairy farm and a distributing plant which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant."

5. Petitioners continued to buy a relatively large volume of milk from pool plants after April 1, 1957, for processing and sale as well as producing milk. The petitioners no longer qualified as producer-handlers under the amended order, and commencing April 1957, they were billed by the market administrator for the order, and paid into the producer-settlement fund, the amount by which the value at the class prices of the milk produced by them during the month exceeded its value at the blend price. Petitioners were also billed for administrative assessments on milk they produced and such assessments have been paid.

Appendix E. — Decision of Judicial Officer of the Department of Agriculture

Conclusions

Petitioners contend that section 987.16, effective April 1, 1957, which, in conjunction with the other provisions of the order, results in the equalization of the milk they produce with the milk of other producers, is invalid because such requirement is unauthorized by the act and is, in fact, contrary to sections 8c (5)(C) and 8c (13)(B) thereof (7 U.S.C. 608c (5)(C), 608c (13)(B). We have recently ruled that such provision is authorized under the act (see *In re Jacob Tanis, et al.*, 17 A.D. 1091 (1958)). Petitioners' arguments in this regard must fail for the reasons stated in the *Tanis* case. See also *In re Benbush Dairy*, 17 A.D. 1185 (1958); *In re Sunflower Dairy, Inc.*, 15 A.D. 1 (1956); *In re Acme Breweries, Inc.*, 9 A.D. 1418 (1950), *aff'd, Acme Breweries* v. *Branman*, 109 F. Supp. 116 (N.D. Calif. 1952).

Petitioners also aver that the disputed amendment is not supported by substantial evidence in the amendment hearing upon which it was based, that it is confiscatory and that it discriminates against them because distributors who handle only their own production are not subject to equalization of the milk produced by them. The decision of the Secretary which preceded the issuance of the contested amendment and the promulgation hearing upon which it was based indicate that if "a producer-handler produces all of his own milk, he carries his own surplus" but that producer-distributors who purchase supplemental supplies of milk from pool plants do not so share the burden of surplus and have a Class I utilization of the milk handled by them. It is further stated in the decision that the disruptive conditions are due primarily to the latter class of handlers who produce some of

the milk which they distribute. The problem presented to the Secretary was the equalization of the burden of surplus among producers and the distinction drawn in the contested amendment between producer-dealers who purchase supplies of milk from pool plants and those who handle milk only of their own production was based upon the failure of handlers such as petitioners, unlike producer-handlers who buy no milk, to carry their share of the market surplus. It cannot be said that section 987.16 of the amended order constitutes an unreasonable classification or that petitioners are unreasonably discriminated against as a result thereof. Cf. *In re Ideal Farms, Inc. et al.*, 18 A.D. 1, 19 (1958). Moreover, the fact that a particular regulation "may demonstrably be disadvantageous to certain areas or persons" is not enough to constitute a violation of the due process clause. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 617-619 (1950) *In re Central Dairy Products* Company, 12 A.D. 303, 312 (1953), and cases cited therein. A member of the class which is regulated may suffer economic losses not shared by others as a direct consequence of regulation, but this does not constitute *per se* a violation of the due process clause. See, *e.g.*, *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944).

It is further concluded, in the light of the expertise of the Secretary, that the evidence in the record of the promulgation hearing which preceded the disputed amendment (See Finding of Fact 3 and footnote 1) could legally form the basis for the judgment of the Secretary reflected in the contested provisions, that is, that handlers who produce milk and who buy supplemental supplies of milk from pool plants be required to equalize their own production with the milk

of other producers. Cf. *Railway Express Agency, Inc.* v. *Civil Aeronautics Board*, 243 F.2d 422 (D.C. Cir. 1957); *In re Jacob Tanis et al., supra; In re The Lawson Milk Company*, 17 A.D. 239 (1958). Petitioners contend that the promulgation record fails to demonstrate then existing inequalities, any need for the disputed provision or any benefit to milk producers as a result of such provision. The promulgation record indicates, in part, the failure of a class of producer-distributors to carry any surplus burden or to share the surplus carried by producers generally, disruption of the market caused by regulated handlers who adjusted their operations to acquire producer-handler status under the order and a competitive advantage of such handlers with respect to fully regulated milk handlers. Upon the basis of the evidence adduced at the amendment hearing, section 987.16 constitues a valid and reasonable exercise of administrative discretion. The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters for administrative competence. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112 (1946); *Secretary of Agriculture* v. *Central Roig Refining Co.*, supra, at pp. 613-614.

In addition, while petitioners allege in their petition that the payments required under the order are confiscatory, the kind of evidence necessary to establish this allegation is totally lacking in the record of this proceeding. See, *e.g.*, *Hegeman Farm Coop.* v. *Baldwin*, 293 U.S. 163 (1934); *Wawa Dairy Farms, Inc.* v. *Wickard*, 149 F.2d 860, 863-864 (3d Cir. 1945). In fact, petitioners have introduced no evidence in this regard and have failed to sustain their burden

of proof thereon. *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939); *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209 (E.D. M. 1945), *aff'd.* 157 2d 87 (8th Cir. 1946).

Petitioners also allege, in effect, that the amended order is invalid and has been invalidly applied to them because the fluid milk they handle is not in interstate commerce and does not burden, obstruct or affect such commerce. In the issuance of the order the Secretary found that the handling of the milk regulated thereunder was in the current of interstate commerce or directly burdened, obstructed and affected interstate commerce in milk or its products. The identical issue was raised in *In re Copiah Guernsey Dairy Cooperatice, Inc.*, 16 A.D. 1193, 1205-1206 (1957), a proceeding also arising under Order No. 87. For the reasons stated in the *Copiah* case at pages 1205-1206 and on the basis of Findings of Fact 2 and 3 contained therein petitioners' contention in this regard must fail.

Finally, it appears that petitioners desire an advisory ruling or commitment. They wish "to ascertain as a matter of law whether or not, if their own production was increased to such an extent that it would not be necessary for them to purchase any additional milk from a regulated pool plant, or any other source, this order could and would be amended so as to cause their increased own-farm production to be placed in the pool and required to make the penalty payments complained of." This request is not proper in an action under section 8c(15)(A) of the act (7 U.S.C. 608c (15) (A)) [2]/ and is addressed, in part at least, to the Secre-

2/ Section 8c (15) (A) of the Act reads, in part, as follows:
"(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law * * *"

tary in his administrative or quasi-legislative capacity. It can be stated at this point, however, that, as indicated by this proceeding itself and the *Tanis* case, *power* so to regulate petitioners exists under the act.[3/]

In conclusion, the amendment effective April 1, 1957, is supported by substantial evidence in the record upon which it is based and constitutes a valid and reasonable exercise of administrative discretion. Furthermore, the order is valid in its application to petitioners' milk and the petition should be dismissed.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this decision are denied.

Order

In view of the foregoing conclusions, the relief requested by petitioners is denied and the petition is dismissed.

Copies hereof shall be served upon the parties and the market administrator for Order No. 87.

Done at Washington, D. C.

June 12, 1959

THOMAS J. FLAVIN
Judicial Officer.

3/ Of course, the requirements of the act generally for the promulgation or amendment of a marketing order would have to be satisfied. See, e.g., sections 2, 8c (3), (4), (17) and (18) of the act.

APPENDIX F.

Opinion In District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
HATTIESBURG DIVISION OF THE SOUTHERN
DISTRICT OF MISSISSIPPI

L. B. VANCE and FORD VANCE,)
Partners, D/B/A VANCE DAIRY,)
Plaintiffs)
Versus) CIVIL ACTION
) NO. 1495
EZRA TAFT BENSON)
Secretary of Agriculture,)
Defendant)

OPINION OF THE COURT

The plaintiffs (appellants), handlers as defined in Order No. 87, as amended, regulating the handling of milk in the Central Mississippi Marketing Area seek a review of the findings of fact, conclusions and order of the Judicial Officer of the United States Department of Agriculture. The Judicial Officer dismissed the petition filed by the plaintiffs pursuant to # 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c (15) (A)), which re-enacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933, as amended (48 Stat. 31). This review proceeding was commenced by the filing of a complaint pursuant to # 8c (15) (B) of the act (7 U.S.C. 608c (15) (B)). The Secretary has answered the complaint and has caused to be filed with the Court a certified copy of his ruling, together with the record upon which it is based.

Appendix F. — Opinion In District Court

In this statutory appeal proceeding the function of the Court is to determine whether, on the record before the Judicial Officer, his ruling is in accordance with law (7 U.S.C. 608c (15) (B).

The ruling of the Judicial Officer is final and conclusive if there is substantial evidence in such record supporting the ruling and the Court may not weigh the evidence and substitute its independent findings for those of the administrative officer.

The sole question involved in the administrative proceeding was the validity of # 987.16 of the order containing the definition of "producer-handler". The petitioners' (plaintiffs herein) complaint was directed specifically against the provisions of said section as it was amended effective April 1, 1957. The order provides, except as to certain producer-distributors, for the equalization of milk produced by handlers with the milk of other producers. The petitioners protested their exclusion from the "producer-handler" status under the order and alleged that the inclusion in the equalization pool with specific exceptions of the milk production of producer-dealers, i.e., producers who also distribute milk, is invalid. Petitioners also contended that section 987.16 was not authorized by the act, is not supported by substantial evidence in the promulgation hearing and is discriminatory and confiscatory.

The statute involved is the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.) (hereinafter referred to as the "act.") It outlines the provisions a milk order may contain and was held constitutional in United States v. Rock Royal Cooperative Association, Inc., et al, 307 U.S. 533 (1939), as well as in other cases. The order involved is Order No. 87, as amended (7 CFR 987.1 et seq.), effective April 1, 1957, issued under the

act and regulating the handling of milk in the Central Mississippi Marketing Area (hereinafter referred to as the "order").

The findings of fact, conclusions of law and order of the Judicial Officer as printed in the Agricultural Decisions (18 A.D. 563) are a part of the record herein. The Judicial Officer in ruling that the disputed provision was valid and authorized by the act cited in support thereof, the ruling on the same issue in a prior proceeding, namely In re Jacob Tanis, et al, 17 A.D. 1091 (1958).

The petitioners have the burden of showing that the action of the Secretary in including the provisions of # 987.16 in the order was invalid and not supported by substantial evidence in the promulgation hearing.

Order No. 87 was originally issued and made effective on November 1, 1954, pursuant to the act. It has been amended from time to time and was amended April 1, 1957, at which time the contested provision was included in the amended order.

The act has been thoroughly reviewed and found to be constitutional. United States v. Rock Royal Cooperative, 307 U.S. 533, (1939); H. P. Hood & Sons v. United States, 307 U.S. 588 (1939); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). See particularly the Rock Royal opinion for a comprehensive discussion of the act and of milk marketing orders.

Under the act, public hearings must be held on all proposed milk marketing orders and amendments thereto, and the Secretary must make findings and take action upon the basis of the record thus made. All prerequisites were duly complied with at the time Order No. 87 was amended effective April 1, 1957. It contains a scheme whereby each handler pays for milk subject to the order at class value or

prices, differing according to the use he makes of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by all handlers under the amended order.

Section 987.16 of the amended order (7 CFR Part 987.16) exempts from regulation those producer-handlers who bottle and distribute *only* their own farm production. If a handler, who has own farm production, obtains any milk from any other source, including milk from a pool plant, he forfeits the exemption and is fully subject to the pricing and pooling provisions of the order. Such a fully regulated handler is required, pursuant to the order, to equalize the milk which he produces with the milk of other producers. The plaintiffs fall within this category. Accordingly, under the applicable provisions of the order, all receipts and disposition of the plaintiffs, including the milk received at their plant which was produced in their capacity as producers, were combined with the receipts and disposition of all other handlers in the market and the average or uniform price of all milk in the pool was computed.

The record shows without dispute that L. B. Vance and Ford Vance are partners and operate a dairy on their own farm. They have not adopted any plan or scheme to evade the payment into the Producer Settlement Fund, but their operation of the dairy business was the same before the amended order as it is now. The owners live and reside on the dairy farm. Cows are maintained there and the milk is processed on the dairy farm which is produced from this particular farm. In addition to processing their own production, they buy some milk from the regulated pool plants and process, pasturize, bottle and sell to consumers this particular milk. The Vances do not complain of the pay-

ment demanded into the Producers Settlement Fund on this milk that is purchased from the regulated pool plants, but their contest in the present litigation is against being required to pay into the Settlement Fund compensation based upon the milk that they actually produce on their farm. All milk not produced by them on their own farm they purchase from a regulated pool plant and pay class #1 price therefor, and under these circumstances the plant from whom they purchase makes the payment into the Settlement Fund.

The order before the Amendment of April 1, 1957 was made read as follows:

> "987.16 Producer-handler. 'Producer-handler' means any person who operates a dairy farm and a distributing plant which, during the month, has no other source milk (except own production) or producer milk."

On April 1, 1957, the Amendment, complained of, was adopted and the definition of producer-handler was changed to read as follows:

> "987.16 Producer-handler. 'Producer-handler' means any person who operates a dairy farm and a distributing plant which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant."

Under the original order, before its amendment, Vance was not required to pay any compensation into the Settlement Fund if he purchased additional milk, nor did he pay any on his own farm production if they purchased any needed additional milk from a regulated plant and paid the Class # 1 price, but he would pay on his own farm production if he purchased any additional milk from a producer or from any other source except a regulated plant on which

the Class # 1 price was paid. The effect of the amendment, if valid, is to require Vance to pay compensation on his own farm production if he purchased any additional milk anywhere, and the record shows that he has purchased additional milk from a regulated pool plant and paid the Class # 1 price therefor, and he has been required under the amendment to pay into the Producer Settlement Fund on all milk produced by him upon the theory that as to all milk, under the circumstances, he is a handler.

The record presents only a question of law. The order as amended is supported by the evidence and the only substantial question raised is did the Secretary exceed his authority by the amendment on April 1, 1957, by which Vance is now required to pay on milk produced by him. The plaintiffs raise other objections, but these are without merit.

The pertinent parts of the Agricultural Adjustment Act are found in Title 7, Chap. 26 of USCA. Section 608 (c) (13) (B) reads as follows:

> "No order issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer."

> "608c ORDERS REGULATING HANDLING OF COMMODITY — ISSUANCE BY SECRETARY.
>
> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, asd 624 of this title as

'handlers'. Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."

Section 608c (5) (C) and (D) reads as follows:

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this sub-section, providing a method of making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

"(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

It is well settled that this Act of Congress is to be given a very liberal construction and has granted to the Secretary broad powers. However, the authority of the Secretary is limited by the terms of the Act and he cannot go beyond the scope of the Act in establishing orders that are in conflict

with it. The order as amended is in conflict with the Act. The language of the Act is very plain and it is not necessary to go to the legislative history to determine what was intended by Congress with reference to the present controversy. It will be noted under Section 608c (13)(B) that Congress specifically stated that no order under these particular sections could be applicable to any producer in his capacity as a producer. Language could not be plainer or more clearly stated than is stated in that provision. Since there is no dispute about the facts in the present case but what Vance is a bono fide producer, the sections above referred to herein cannot be made applicable to him.

The other sections hereinabove quoted refer to handlers and authorize the Secretary, subject to the provisions of the Act, to issue from time to time and amend orders that may be applicable to processors, associations of producers and others engaged in the handling of any agricultural commodity wherein interstate commerce is affected. The Secretary relies largely upon Section 608c (5)(C) to uphold his definition made by the amendment of producer-handler and particularly that part of the section reading as follows: "• • • as among handlers (including producers who are also handlers); to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragrph (A) of this section." This language cannot support the contention of the Secretary because the Act must be read in its entirety and when you refer to Section 608c (13)(B) the language is specific that no order issued under these sections shall be applicable to any producer in his capacity as a producer.

It cannot be denied, under the facts shown in this record, that Vance was the producer of a large part of his milk and that in addition thereto, then he became the handler as

to the milk that was purchased by him, and this he does not dispute. I think the Act is clear that Congress had reference only to milk purchased from some source other than that as produced by himself. If Congress had intended anything else, it would have been easy to have expressed it more clearly. The bill was thoroughly considered by Congress and every word used in the Act was given thorough consideration, and the language was chosen after lengthy hearings and debate. The Act contains no definitions of the words "processers", "producers" or "handlers", but from the context of the language of the Act it is apparent that Congress intended that the words used in the Act should receive their usual and generally accepted meaning. Applying that rule, the word "purchaser" is more generally defined as meaning to obtain or secure for one's own personal benefit by paying a consideration. See Words and Phrases, Permanent Edition. It would be difficult to apply a definition to the word "purchaser" which would imply that one can purchase anything from himself. Such a definition would rise to an absurdity. If one produces an article, it is his without purchase and a fair definition of "purchase" may be found in the case of U. S. v. Scovil, 348 U.S. 218. Likewise, the case of Dairymen's League Cooperative Ass'n, Inc. v. Brannon, 173 Fed (2) 57, is applicable to the question here involved. While the facts are different, yet the Court was dealing with a concern that was delivering cream from its Hoboken plant to other purchasers by the Janssen Company and held that such delivery was not to a purchaser. Also see Footnote 49, Vol. 36 C.J.S. p. 1072.

I am not overlooking the rule of law that the construction placed upon the Act by the administrative body, here the Secretary of Agriculture, is entitled to great weight and it is with reluctance that I reach a contrary conclusion from that reached by the Secretary, but I am of the opinion that

the authorities require such a conclusion. The Court is not bound by the judgment and interpretation of the Secretary, but does give it great weight and respect, but it is well settled by the authorities that it is not conclusive. See County of Marion v. U. S., 356 U.S. 411.

Counsel for the Secreary have cited many authorities, none of which are applicable to the present order, nor do they uphold the validity of the present order as amended. One of the opinions of the Judicial Officer wherein the question involved here is discussed is In Re Jacob Tanis et al, 17 A. D. 1091, and several authorities therein cited. I have read this opinion carefully and with keen interest because of its exhaustive study, but cannot agree that it controls the order as amended herein complained of. The facts in the present case show clearly and without dispute that the plaintiffs herein are producers and processers of their own milk and are exempt by the sections hereinbefore cited. Likewise, they are handlers of milk they purchase and there is no dispute but what they are complying with the law and all orders in that respect as handlers.

The order as amended is not in accord with law and the judgment of the Secretary will be reversed and remanded to him to adopt such order as to eliminate plaintiffs herein as to the milk produced on their own farms by them as producers, and that the plaintiffs have judgment for such amounts as they have been required to pay into the Producers Settlement Fund or Administrative Fund.

The order as amended was beyond the powers of the Secretary to promulgate. It is well settled that an administrative board cannot promulgate an order that will have the effect of law that is in contravention of the Act itself. This principle is well settled, but a recent case affirming that doctrine is that of Commissioner of Internal Revenue v. Fred N. Acker, decided by the Supreme Court of the United

Appendix G. — Lower Court Letter Following Lehigh Valley Cooperatives Farmers, Inc., v. United States of America 370 U. S. 76

States November 16, 1959 and reported in Volume 80, Supreme Court 144.

An order may be drawn in accord herewith.

S. C. MIZE
United State District Judge

APPENDIX G.

Lower Court Letter Following Lehigh Valley Cooperatives Farmers, Inc., v. United States of America 370 U. S. 76

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleas 6, La.

June 11, 1962

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Appendix G. — Lower Court Letter Following Lehigh Valley Cooperatives Farmers, Inc., v. United States of America 370 U. S. 76

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Mr. R. Emmett Kerrigan
Attorney at Law
New Orleans, La.

Re: No. 18731 — Ezra Taft Benson, Secretary of Agriculture (Orville L. Freeman, Secretary of Agriculture, substituted as party appellant in the place and stead of Ezra Taft Benson) vs. L. B. Vance and Ford Vance, Partners, doing business as Vance Dairy

Gentlemen:

The above-styled case submitted April 25, 1961, has been held by the Court awaiting decision of the Supreme Court of the United States in Lehigh Valley Co-operative Farmers, Inc., et al. v. United States of America, et al., No. 79, October Term 1961, which was decided on June 4, 1962. The Court requests that counsel on either side advise the Court the form of order which in the opinion of counsel should be entered to dispose of the above-styled case. If counsel are not agreed on the form of such order, the Court will hear from them by memoranda or typed briefs before finally disposing of this appeal.

Yours very truly,

EDWARD W. WADSWORTH, Clerk

APPENDIX H.

Circuit Court Opinion

Before RIVES, JONES and BROWN, Circuit Judges.

PER CURIAM: This appeal is from a judgment concluding:

> "That the amendment to p. 987.16 of Order No. 87 issued by the Secretary of Agriculture and made effective on and after April 1, 1957, insofar as it made milk produced by the person who also operated the plant in which it was processed and from which it was distributed as fluid milk in the marketing area, subject to the pricing, pooling and administrative assessment provisions of the order, was not in accordance with law because it is in conflict with p. 8c (13) (B) of the Act (7 U.S.C. 608c (13) (B)) which provides that no such order shall be applicable to any producer in his capacity as a producer."

In *Ideal Farms, Inc. v. Benson*, D.C. N.J., 1960, 181 F. Supp. 62, 73, Judge Wortendyke arrived at the opposite conclusion:

> "I accept the construction of the word 'purchased' as applied in the Rock Royal case, supra [United States v. Rock Royal Co-Operative, Inc., 1939, 307 U.S. 533, 578-581], and those decisions which have followed it. I therefore conclude that the provisions of § 927.65 of Order No. 27 are fully in accord with the enabling statute, and that the refusal of the Secretary to exempt the plaintiffs from the obligation to include their own-produced milk in the calculation of their net pool obligations, was in all respects legal and within his statutorily delegated power."

By a divided court the Third Circuit affirmed. *Ideal Farms, Inc. v. Benson*, 3 Cir., 1961, 288 F. 2d 608, 618. The Supreme Court has denied certiorari from that decision,

372 U.S. 965.[1] We agree with the reasoning and conclusion of the Third Circuit.

The judgment of the district court is therefore reversed, and the ruling or decision of the Judicial Officer which sustained the validity of the contested provisions of the order (18 Agr. Dec. 563-570) is upheld as being in accordance with law.

REVERSED AND RENDERED.

[1] For a discussion of the general scheme of milk regulation, see Lehigh Valley Cooperative v. United States, 1962, 370 U.S. 76.

APPENDIX I.

Decision Denying Rehearing

ON PETITION FOR REHEARING.

Before RIVES, JONES and BROWN, Circuit Judges.

PER CURIAM: In reversing and rendering the judgment of the district court, we gave consideration to the contentions renewed on petition for rehearing which were not involved in *Ideal Farms, Inc. v. Benson,* 3 Cir. 1961, 288 F. 2d 608, cert. denied, 372 U.S. 965. We hold that there were sufficient findings by the Secretary that appellees intrastate handling of milk in this marketing area directly affects interstate commerce, and further that the Secretary's order is not a trade barrier in violation of Sec. 8c(5)(G) of the Agricultural Marketing Agreement Act of 1937 [7 U.S.C.A. § 608 (c) (5) (G)] as construed in *Lehigh Valley Cooperative Farmers, Inc., et al. v. United States, et al.,* 1962, 370 U. S. 76.

The petition for rehearing is

DENIED.

APPENDIX J.

Judgment

Before RIVES, JONES and BROWN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and the ruling or decision of the Judicial Officer which sustained the validity of the contested provisions of the order (18 Arg. Dec. 563-570) is upheld as being in accordance with law.

June 19, 1963

Issued as Mandate: JAN 9 1964

APPENDIX K.

A Listing of the Basic Provisions of Federal Milk Orders Affecting the Milk of Farmers Who Produce and Distribute Their Own Milk

I. No Federal Milk Order known to counsel for the Petitioner requires regulatory payments on the milk produced by a farmer and sold to the households in the vicinity of his farm, if the farmer observes the other terms and conditions placed upon him.

II. The following 68 orders are directly opposite from the Central Mississippi Order and provide that even if the farmer (called in the order a producer-handler) purchases

Appendix K. — A Listing of the Basic Provisions of Federal Milk Orders Affecting the Milk of Farmers Who Produce and Distribute Their Own Milk

needed milk for his customers from a pool plant he will not be assessed upon his home farm milk, on account of such purchases, accordingly such purchases are without penalty:

Washington, D. C.	7 CFR 1003.12
Tri-State	7 CFR 1005.15
Greater Wheeling, W. Va.	7 CFR 1008.13 (a, b & c)
Clarksburg, W. Va.	7 CFR 1009.13 (a, b & c)
Wilmington, Delaware	7 CFR 1010.13
Appalachian	7 CFR 1011.14
Connecticut	7 CFR 1015.2 (i)
Chicago, Ill.	7 CFR 1030.45 (3);
see also	7 CFR 1030.60
South Bend, La Porte, Elkhart, Indiana	7 CFR 1031.16
Suburban St. Louis	7 CFR 1032.8
Greater Cincinnati	7 CFR 1033.13
Dayton-Springfield, Ohio	7 CFR 1034.14
Columbus, Ohio	7 CFR 1035.15
Northeastern Ohio	7 CFR 1036.13
North Central Ohio	7 CFR 1037.14
Rock Rines Valley	7 CFR 1038.15
Milwaukee, Wisc.	7 CFR 1039.13
Southern Michigan	7 CFR 1040.8
Toledo, Ohio	7 CFR 1041.14
Muskegan, Michigan	7 CFR 1042.9
Upstate, Michigan	7 CFR 1043.12
Michigan Upper Peninsula	7 CFR 1044.13
Northeastern Wisconsin	7 CFR 1045.12
Ohio Valley	7 CFR 1046.9
Fort Wayne, Indiana	7 CFR 1047.9
Greater Youngstown, Warren	7 CFR 1048.9
Indianapolis, Indiana	7 CFR 1049.9
Madison, Wisconsin	7 CFR 1051.14
St. Joseph, Missouri	7 CFR 1061.9
St. Louis, Missouri	7 CFR 1062.13
Quad Cities, Dubuque	7 CFR 1063.13
Greater Kansas City	7 CFR 1064.12
Nebraska—Western Iowa	7 CFR 1065.9

Appendix K. — A Listing of the Basic Provisions of Federal Milk Orders Affecting the Milk of Farmers Who Produce and Distribute Their Own Milk

Sioux City, Iowa	7 CFR 1066.10
Ozarks	7 CFR 1067.15
Duluth Superior	7 CFR 1069.11
Cedar Rapids, Iowa	7 CFR 1070.13
Neosho Valley	7 CFR 1071.10
Sioux Falls, Mitchell 8, Dakota	7 CFR 1072.13
Wichita, Kansas	7 CFR 1073.12
Southwest Kansas	7 CFR 1074.13
Black Hills, South Dakota	7 CFR 1075.15
Eastern South Dakota	7 CFR 1076.13
North Central Iowa	7 CFR 1078.13
Des Moines, Iowa	7 CFR 1079.15
Chattanooga, Tenn.	7 CFR 1090.10
New Orleans, La.	7 CFR 1094.13
Northern Louisiana	7 CFR 1096.9
Memphis, Tenn.	7 CFR 1097.14
Nashville, Tenn.	7 CFR 1098.9
Paducah, Ky.	7 CFR 1099.12
Knoxville, Tenn.	7 CFR 1101.7
Fort Smith, Ark.	7 CFR 1102.13
Central Mississippi	7 CFR 1103.16
Red River Valley	7 CFR 1104.13
Mississippi Delta	7 CFR 1105.13
Oklahoma Metropolitan	7 CFR 1106.15
Mississippi Gulf Coast	7 CFR 1107.13
Central Arkansas	7 CFR 1108.14
Lubbock-Plainview, Texas	7 CFR 1120.18
Central West Texas	7 CFR 1128.13
Austin-Waco, Texas	7 CFR 1129.18
Corpus Christi, Texas	7 CFR 1130.15
Texas Panhandle	7 CFR 1132.13
Inland Empire	7 CFR 1133.16
Western Colorado	7 CFR 1134.10
Colorado Springs, Pueblo	7 CFR 1135.11
Eastern Colorado	7 CFR 1137.11

Appendix K. — A Listing of the Basic Provisions of Federal Milk Orders Affecting the Milk of Farmers Who Produce and Distribute Their Own Milk

III. The following 12 orders allow the farmer to make supplemental purchases of specific quantitative amounts of milk, without assessment against his home farm milk. These provisions came into being after 1957.

Boston	7 CFR 1001.2 j
New York - New Jersey	7 CFR 1002.15 (c) (3)
Springfield, Mass.	7 CFR 1006.2 j
Worcester, Mass.	7 CFR 1007.2 j
Southeastern New England	7 CFR 1014.2 (i)
Upper Chesapeake Bay (Maryland)	7 CFR 1016.2 (i)
Minneapolis - St. Paul, Minn.	7 CFR 1068.15
North Texas	7 CFR 1126.17 (d)
Puget Sound	7 CFR 1125.102(d)
Central Arizona	7 CFR 1131.11 (a)
Great Basin, Utah, Nevada and Wyoming	7 CFR 1136.8 (b) (2)
Rio Grande Valley	7 CFR 1138.8 (a)

IV. The following orders are the only orders in the United States known to counsel in which home farm milk of farmers, is assessed for purchases of any needed additional milk. These orders were amended to so provide in 1959 or latter.

Central Mississippi	7 CFR 1003.16 (Renumbered by Federal Register from 997.16 without change)
Southeastern Florida	7 CFR 1013.8

V. The following orders forbid the purchase of cows or barns or milking parlors, or the sale of cows or barns or milking parlors by a farmer who sells his milk to the households in the vicinity of his farm except in certain times of the year and only after notice to the Milk Market Administrator.

New York - New Jersey	7 CFR 1002.15 (c) (1) & (2)
Puget Sound, Washington	7 CFR 1125.102 (d) (2) (3) & (4)

APPENDIX L.

Decision Lewes, Freeman, United States District Court, Delaware CA 2353.

LAYTON, *District Judge*:

This is a proceeding to review the Secretary of Agriculture's determination that Federal Milk Marketing Order No. 16 is in accordance with law. Both parties have moved for summary judgment, the basic facts being undisputed.

FINDINGS OF FACT

1. Federal Milk Marketing Order No. 16, 7 C. F. R. 1016 *et seq.* (hereafter referred to as "Order") regulates the price to be paid to Producers of milk by Handlers for milk shipped into the Upper Chesapeake Bay (Maryland) marketing area.

2. Under the Order, Handlers are required to pay a uniform "blend price" to their Producers.

3. Handlers settle between themselves for overpayments or underpayments to their Producers according to their utilization through a Producer-Settlement Fund. Class I utilization has a higher value than Class II utilization.

4. A "Handler" is, *inter alia*, an operator of a plant which during the month disposes of a Class I milk on routes in the marketing area a quantity equal to not less than 10% of its total receipts of milk from dairy farmers and which disposes of as Class I milk a quantity equal to not less than 50% of such receipts.

5. Plaintiff-Lewes' plant is located in Lewes, Delaware, which is not within the geographical boundaries of the marketing area defined in the Order.

Appendix L. — Decision Lewes, Freeman, United States District Court, Delaware CA 2353.

6. Lewes disposes of more than 10% of its milk as Class I milk into the marketing area, and is thus a Handler as defined in the Order and is subject to the Order's price regulations.

7. Lewes sells all of its milk at a Class I utilization, and thus pays into the Producer-Settlement Fund the difference between the established blend price and the Class I price designated in the Order.

8. Lewes disposes of between 35% and 45% of all of its milk in the marketing area covered by Milk Order No. 16.

9. Under the Order, Lewes must contribute to the Producer-Settlement Fund, the Administrative Assessment Fund, and the Marketing Services Fund based not only on the 35%-45% of its total volume (that part shipped into the marketing area), but on 100% of its volume.

10. The requirement of Lewes to pay the difference between the blend price and the Class I price into the Producer-Settlement Fund on milk not shipped into the marketing area places it at a competitive disadvantage with non-regulated Handlers in Delaware (those who ship less than 10% of its milk into the marketing area).

11. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

12. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not put it at a competitive advantage over Handlers who ship all of their supply into the marketing area.

13. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not destroy the purpose of the Order, which is to guarantee a uniform blend price to producers of milk finding its way into the geographical area which the Administrator *has chosen to regulate.*

CONCLUSIONS OF LAW

1. The Agricultural Marketing Agreement Act (7 U. S. C. 601 *et seq.*) provides in Section 608c (5) (G), as follows:

> " marketing agreement or order applicable to milk and its product in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

2. The above quoted section prohibits the Secretary of Agriculture from setting up any kind of economic trade barrier through his marketing area price regulations. Lehigh Valley Co-operative Farmers, Inc. v. U. S., 370 U. S. 76, 97 (1962). In light of the *Lehigh Valley* decision, Titusville Dairy Products Co. v. Brannan, 176 F. 2d 332 (3d Cir. 1949), is not authority permitting regulation of milk prices on milk not sold in the marketing area.

3. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

4. To the extent that Lewes is required to pay into the various funds on the basis of milk it does not dispose of in

the marketing area chosen to be regulated by the Administrator, Order No. 16 imposes a trade barrier between Delaware and the marketing area.

5. Whether or not the question of the Order's imposition of a trade barrier was raised before or decided in the administrative proceeding below, justice requires that this question be decided in this review proceeding without remand for further administrative hearings.

6. Order No. 16 is not in accordance with law to the extent that it regulates prices to be paid by Handlers on milk not shipped into the defined marketing area.

7. In the light of the foregoing, other arguments raised by the plaintiff need not be considered.

These findings of fact and conclusions of law shall also be deemed applicable to plaintiffs Clifford S. Ott and James M. Faulkner, as individuals; and d/b/a Hollybrook Dairy, a partnership, except to the extent of the percentage of Class milk, over and above 10%, previously delivered by said plaintiffs into the marketing area.

Plaintiffs' motion for summary judgment is hereby granted.

Defendant's motion for summary judgment is hereby denied.

Wilmington, Delaware, July 1, 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, PETITIONERS

v.

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 107a) is not reported. The original opinion of the court of appeals (Pet. App. 119a) is reported at 319 F. 2d 841, and the opinion of the court of appeals denying a petition for rehearing (Pet. App. 120a) is reported at 325 F. 2d 663.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1963 (Pet. App. 119a). A timely peti-

tion for rehearing was denied on December 18, 1963 (Pet. App. 120a), and judgment was entered on January 9, 1964 (Pet. App. 121a). The petition for a writ of certiorari was filed on March 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture is authorized by the Agricultural Marketing Agreement Act of 1937, as amended, in a milk marketing order to require handlers of milk to account to the producer settlement fund with respect to milk which they themselves produce and market.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, and the Central Mississippi Milk Marketing Order [1] are set forth in the Appendix, pp. 9-12, *infra*.

STATEMENT

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue regional marketing orders applicable to persons engaged in the distribution of milk and milk products, so as to maintain orderly marketing conditions. 7 U.S.C.

---

[1] Order No. 87 (7 C.F.R. 987) was renumbered as 103 on January 1, 1963 (7 C.F.R. 1103, *et seq.*)

602, 608c. Such orders are applicable to "handlers," a term defined in 7 U.S.C. 608c(1) to mean "processors, associations of producers, and others engaged in the handling of * * * " milk, but the Act also provides that no order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c (13)(B).

The order involved in this case regulates the marketing of milk in the central Mississippi marketing area. It provides for the classification of milk based upon use, establishment of minimum prices for each class, payment by handlers to producers of a uniform "blend" price for all purchases of milk, and for adjustments in payments among handlers, through a "producer settlement fund," so that each handler's payments for milk will equal the value of the milk handled by him at the minimum class prices fixed under the order. Each handler must file a monthly report with the Market Administrator, indicating the total quantity of milk received by him from all sources, including milk of his own production, and the use made of this milk. On the basis of the data for all handlers, the Market Administrator calculates the "blend" price, which is the minimum price which each pool plant handler must then pay to all his producers, regardless of the uses to which the individual handler puts the milk. If a handler's payments to producers are less than use value for this handler's milk, the handler pays the difference into a producer settlement fund; if the amount received by a handler's producers exceeds the use value of the handler's milk, the dif-

ference is paid to the handler out of the producer settlement fund.[2]

Before April 1, 1957, the order exempted all persons who produced and distributed their own milk, even though they also handled milk which they acquired from sources other than their own farms. In 1957 the order was amended to limit the exemption to persons whose *sole* source of supply is their own production, 22 F.R. 2121; 7 C.F.R. 1103.16, 1103.60.

Petitioners are partners doing business as Vance Dairy in Hattiesburg, Mississippi. They operate a dairy farm and they process, market and otherwise handle the milk produced on their farm as well as milk obtained from other persons.[3] Petitioners contended that the amended order was invalid because it required them to include milk produced on their own farm in the calculation of their obligations to the producer settlement fund. They maintained that 7 U.S.C. 608c(5) authorizes regulation only with respect to milk "purchased" from producers, and that milk obtained by a handler from his own farms is not "purchased" within the meaning of the statute. This claim was rejected by a Judicial Officer (Pet. App. 96a). On statutory judicial review (7 U.S.C. 608c (15)(B)), however, the district court concluded that

---

[2] The identical scheme of milk marketing regulation was recently described by this Court in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 80-81.

[3] The record shows that petitioners have purchased relatively large volumes of milk from pool plants operated by other handlers (Resp. Ex. 1, R. I 63, R. II 244; 18 Agr. Dec. 565, 567).

the Secretary exceeded his authority in requiring petitioners to price and pool the milk which they themselves produced (Pet. App. 107a). The Court of Appeals for the Fifth Circuit reversed in a *per curiam* opinion (Pet. App. 119a), adopting the view of the Third Circuit in *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608, certiorari denied, 372 U.S. 965.

ARGUMENT

The court of appeals' decision in this case has applied the governing statute consistently with its remedial objective. The holding is in accord with the Third Circuit's resolution of the identical issue in *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608, certiorari denied, Oct. Term, 1962, 372 U.S. 965. There is no conflict in decisions nor any other reason for further review by this Court.

1. Petitioners' claim that the decision conflicts with *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, is without merit. The *Lehigh Valley* case concerned the validity of a milk marketing regulation which imposed a "compensatory payment" on the entry of outside milk into a marketing region. The Court concluded that the payment in that case, which placed the outside milk at a competitive disadvantage and made it "economically unfeasible for a handler to bring such milk into the marketing area" (370 U.S. at 84), was invalid under Section 8c(5)(G) of the Act, which prohibits the imposition of economic trade barriers in the regulation of milk marketing.

The present case does not concern "compensatory" payments or outside milk. Petitioners are fully regulated handlers, whose milk is distributed in the marketing area. Their milk qualifies as pool milk; and petitioners are required to account to the producer settlement fund, as are all handlers under this order and under all orders covering marketwide pools.

2. It accords with the purposes of the Act to subject producer-distributors (such as petitioners) who deal in purchased milk in addition to their own to the equalization terms of the order. Since one of the purposes of the marketing plan is to protect milk producers from competition for premium outlets by allocating these outlets among all producers, see *Lehigh Valley*, 370 U.S. at 81, a complete exemption for producer-distributors might undermine the scheme.[4] In general, producer-distributors deal in high-return milk, which is distributed for fluid use. If they are not required to make payments into the producer settlement fund with respect to their own milk, they could effectively throw the major burden of the sur-

[4] The exemption retained in Sections 987.16 and 987.60 of the amended order was based on the finding with respect to the volume of own-farm production and the lack of evidence to show any disrupting effect on marketing activities in the area. Petitioners' contention that it was incumbent upon the Secretary to make specific findings regarding the *quantity* of disruption caused by producer-handlers who deal in milk other than their own. (Pet. 16-20) is frivolous. In the present case, unlike *United States* v. *Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 294 U.S. 499, there are abundant reasons in the record (*e.g.*, Pet. 88a-91a) to support the Secretary's determination, entirely apart from the quantum of "disruption."

plus or low-return milk on the other area producers. By removing some of the more profitable fluid milk returns from the calculations whereby the "blend" price is determined, such producer-distributors could also depress the uniform price received by the other area producers. See *Nebbia* v. *New York*, 291 U.S. 502, 517-518. Finally, they might have a significant competitive advantage over other area "pool" handlers who must account to the producer settlement fund for high-return sales and who must bear the cost of administering the program.

3. Nor is there substance to the argument that petitioners have not "purchased" milk within the meaning of Sections 8c(5)(A) or 8c(5)(C) when they handle their own milk for distribution. This Court held in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 580, that "the word 'purchased' means 'acquired for marketing.'" The *Rock Royal* principle, which was formulated in that case in response to the contention that a marketing agent was not a "purchaser," was also applied in *Shawangunk Cooperative Dairies, Inc.* v. *Jones*, 153 F. 2d 700 (C.A. 2), where the court rejected the argument that a gratuitous bailee had not "purchased" milk it held for sale. The Second Circuit construed "purchased" to mean "received" (153 F. 2d at 704), a reading which is consistent with the result here and in *Ideal Farms*. See also *Elm Spring Farm* v. *United States*, 127 F. 2d 920, 927 (C.A. 1).[5]

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[5] *Dairymen's League Co-op. Ass'n* v. *Brannan*, 175 F. 2d 57 (C.A. 2), relied on by petitioners, is inapposite. It involved the construction of a milk order for purposes of

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May, 1964.

---

determining the classification of milk moved from one plant of a handler to another plant of the same handler. As was pointed out by the Third Circuit in *Ideal Farms*, 288 F. 2d at 618, it did not involve a construction of the term "purchased" in Sections 8c(5)(A) and (C) of the Act.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, provides, in pertinent part:

§ 608c. Orders regulating handling of commodity.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) * * * *

(ii) for the payment to all producers and associations of producers delivering milk to

all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * *

(13) *Retailer and producer exemption.*

* * * *

(B) No order issued under sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * *

The Central Mississippi Milk Marketing Order, effective April 1, 1957 (22 F.R. 1589, 2049, 2121, as set forth in 7 C.F.R. 1103, *et seq.*), provides in pertinent part:

* * * *

§ 1103.9 Pool plant.

"Pool plant" means either a distributing plant or a supply plant, except a plant operated by a producer-handler.

* * * *

§ 1103.16 Producer-handler.

"Producer-handler" means any person who operates a dairy farm and a distributing plant which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant.

* * * *

§ 1103.60 Producer-handlers.

Sections 1103.40 to 1103.46, 1103.50 to 1103.54, 1103.61, 1103.62, and 1103.70 to 1103.72, 1103.80 to 1103.83, and 1103.90 to 1103.98 shall not apply to a producer-handler.

* * * *

§ 1103.96 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the

"producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 1103.62, 1103.93 and 1103.97, and out of which he shall make all payments pursuant to §§ 1103.93 and 1103.98: *Provided*, That any payments due to any handler shall be offset by any payments due from such handler.

Prior to the April 1, 1957, amendment (22 F.R. 2121), the terms of section 1103.16 provided as follows:

§ 987.16 *Producer-handler.* "Producer-handler" means any person who operates a dairy farm and a distributing plant which, during the month, has no other source milk (except own production) or producer milk.

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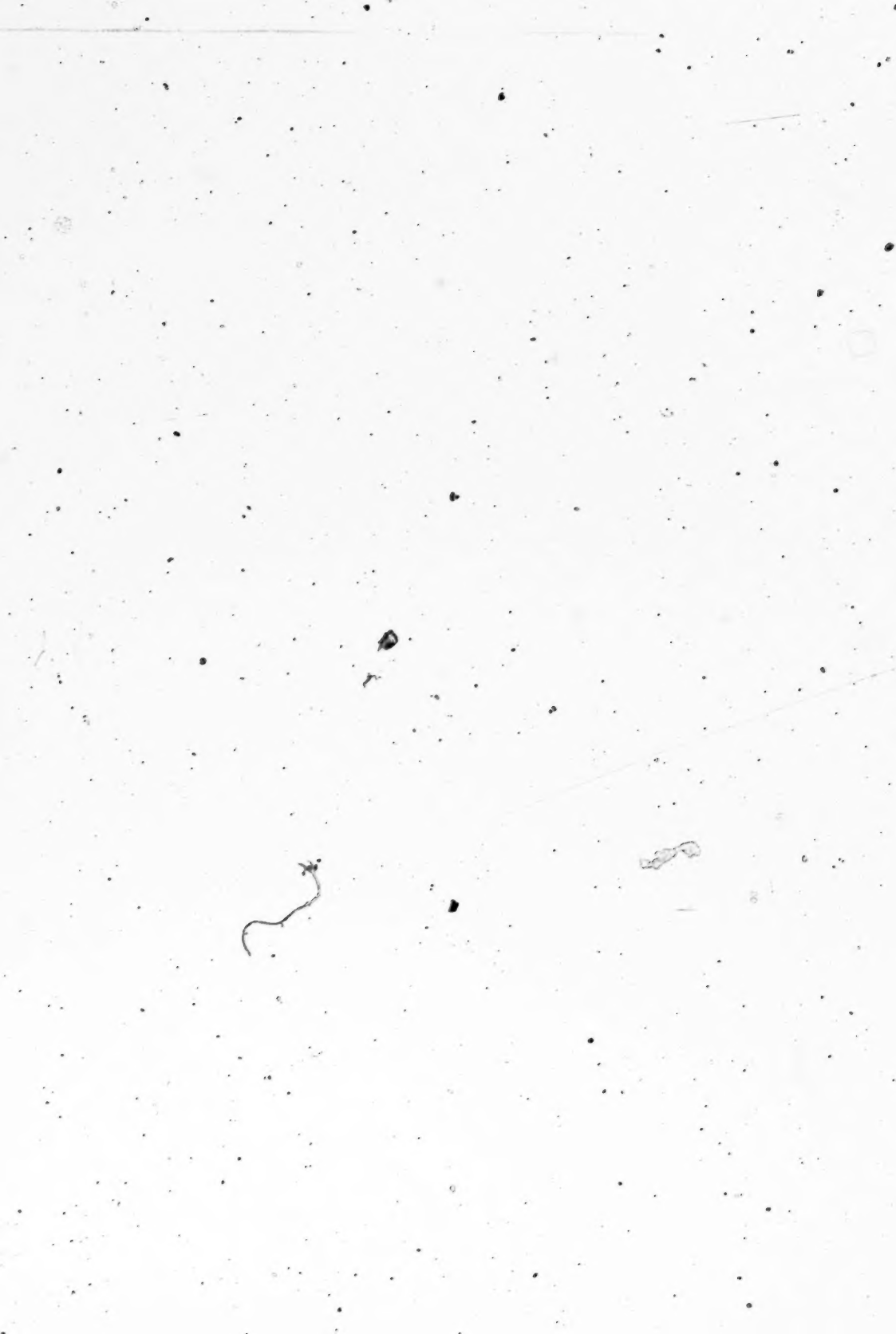

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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, Partners doing business as VANCE DAIRY,

Petitioners,

—*v.*—

ORVILLE FREEMAN, Secretary of Agriculture of the United States of America,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS WITH APPENDIX

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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, Partners doing business as VANCE DAIRY,

Petitioners,

—*v.*—

ORVILLE FREEMAN, Secretary of Agriculture of the United States of America,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS WITH APPENDIX

ARGUMENT

1. On January 28, 1964, the Secretary published in the Federal Register (29 FR 1403, at 1407), a recommended decision on the order area involved herein, i.e. Central Mississippi Federal Milk Marketing area, which should be brought to the court's attention. This is a public record, issued by the Secretary of Agriculture and is material to the arguments raised in the Brief of the Solicitor General at pages 6-7.

In this recommended decision the Secretary completely reversed the position which he took in the 1957 Amendment, here contested. The Secretary now recommends that Vance Brothers and others similarly situated be allowed to buy unlimited amounts of needed supplemental milk without any loss of exemption, or the incurrence of large

assessments on his home-farm milk. Pertinent language is abstracted in Appendix "A".

This recommended decision is not final, and on the Secretary's theory could be reversed tomorrow, and if made final could be abandoned and reversed at any time thereafter. Yet the issuance of this recommended decision we submit is the best proof that the Solicitor-General's argument at pages 6 and 7 of the Respondent's brief that an exemption of Vance Brothers and others similarly situated "might" adversely affect the regulatory scheme is not of actual practical significance, since the Secretary now finds no adverse affect from allowing Vance Brothers to buy supplemental milk from regulated plants, whereas before he would not allow the purchase of so much as one pint of milk from a regulated handler.

This recommended decision for Central Mississippi is similar to a recommended decision issued on November 6, 1962, (27 FR 10795, at 10797), in the Southern Michigan marketing area, in which the Secretary himself again rejected one of the reasons which he advances to the court at pages 6-7, and asserted the restricting of purchases from pool plants tended to unduly increase surplus milk production by the farmer-distributor, and was not efficient. Pertinent excerpts of this recommended decision are attached hereto as Appendix "B".

In actual fact a holding by this court granting relief to Vance Brothers will require no adjustments whatever in the present treatment of the farmer-distributor who sells only the milk of his own production, since the Secretary already exempts such a person from the regulatory provisions in every Federal milk order area, and will require no adjustments whatever in 68 milk orders, where needed supplemental milk may be bought without penalty (See Appendix K page 121a-124a in Appendix to Petition.)

A grant of the relief sought herein would in practical effect return to the type of exemption the Secretary followed for 20 years prior to 1957, when he complied with the intent of Congress and in all markets exempted the milk produced, processed and distributed by a farmer, from regulatory payments, whether he bought supplemental milk from a regulated handler or not.

The Secretary now deems "frivolous", and plainly regard as unnecessary, any evidentiary basis for, or explanation of, the patently inconsistent results reached by him, and seeks to rely upon arguments which he can use either way, rather than evidence and findings of fact.

If such is to be the level of the Secretary's legal responsibility, it is plain that the Congressional requirements that hearings be held, evidence taken and findings based on evidence and decisions issued, together with a full explanation, will be set at naught and the Secretary will be able to reach utterly inconsistent results in similar circumstances at his will.

This is an issue which transcends the present case and involves the nature and type of a hearing and findings which the Secretary is required to hold and make, and raises an issue in which all regulated persons and the public in general have an interest.

2. It is in part the position of the Petitioners that Congress failed to include the Petitioners within the regulated class; that the lower court decisions cited in the brief of Respondent at page 7 proceed from an extension of the language of the Supreme Court in *United States* v. *Rock Royal Co-Operative, Inc.*, (307 U. S. 533, 580), and that this language has been misread by the lower court. Only the Supreme Court can finally determine the meaning of its opinions, *and this court has not yet held that milk in a cow's udder was purchased by the farmer who milks her.*

The lower courts' construction renders the word "purchase" the equivalent of handle or handlers. Since these latter words were already in the previous Act of 1933, the addition of the word "purchase" would have been unnecessary and superfluous.

The Act when read in its entirety makes it plain that "purchase" was not to be superfluous.

For example, the Act authorizes only the "fixing of prices" to be paid by "all handlers for milk purchased from producers," (8c(5)(A)), and provides for "payment" (8c(5)(B)(i), (ii). The jurisdictional clause uses the words "after purchase" in their normal commercial sense and couples it with "sale" (8c(10)(j)). The word "purchase" was inserted in one section by Amendment of the Senate and agreed to by the House of Conference.[1/]

The committee reports indicdate the word "purchase" was taken from two Supreme Court cases, involving actual purchases, i.e. *Lempke* v. *Farmers Grain*, (258 U. S. 50), and *Baldwin* v. *Seelig*, (55 Sup. Ct. Rept. 497).[2/]

In view of the foregoing the word "purchase" was not intended to be superfluous and should not be so construed.

It is significant also that the Act forbids the regulation of a producer as a producer, and restricts the Secretary to specific terms in the orders, "and no others" (8c(5)(A)), without any express reference to the authority to regulate farmer-distributors, or to regulate them as they are regulated in the contested order. It is significant also that the committee reports state that:

"The orders can be made applicable only to specified commodities and *can contain only such terms and con-*

[1/]See Conference Report number 1757, Aug. 12, 1935, Senate Amendment number 21.

[2/]House of Agriculture Committee Report number 1241, June 15, 1935, on HR 8492, at page 10.

ditions as are expressly authorized in the proposed amendment. Furthermore the amendment contain *provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power* conferred on the Secretary."[3]/

It is also significant that the Lehigh Valley decision (370 U. S. 76) recognized that the pool is for "bought" milk, (See page 81).

In short we respectfully submit the exemption emanates from Congress.

3. All other points raised in the petition are urged again, but not referred to herein, since they were not discussed in the brief in opposition, or as in the case of the trade barrier issue, the defense was answered in the petition.

Respectfully submitted,

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[3]/Senate Report number 1011, 74th Congress First Session on HR 8492, July 3, 1935. (See also House of Agricultural Committee Report 1241, 74th Congress First Session page 7, where the above language is coupled with "specific exemption of producers" from the Secretary's power).

APPENDIX A

"The definition of a 'producer-handler' should be modified from that contained in either the present Central Mississippi or Mississippi Gulf Coast orders."

"*Producer-handlers* usually operate small businesses, handling essentially only Class I milk and relying primarily on their own farm production as a source of supply. Such individuals *assume the risks of production as well as the risks of processing and distribution. Under such circumstances it is not necessary to subject them to regulation* other than reporting to attain the purposes of the Act."

"*The incentive to attempt to masquerade as a producer-handler can be substantially alleviated by permitting purchases of Class I milk from pool plants.* Since producers do not otherwise share in the Class I sales of producer-handlers and *it is the nature of a producer-handler business that supplemental purchases would be needed for Class I use*, it is appropriate that any purchases made from the pool by a producer-handler carry a Class I classification." (Emphasis supplied).

29 FR 1403, 1407

APPENDIX B

"The reliance of producer-handlers on supplemental milk from pool plants ranges from between about 2 to 50 percent of their total receipts, with the latter percentage being more nearly representative of the group. Thus, the proposal would result in the pooling of own-farm production of most producer-handlers and would provide an incentive for such operators to increase own-farm production significantly in order to maintain exempt status. *To provide such encouragement for increased milk production in a market already adequately supplied might interfere with the efficient use of agricultural resources.*

"There is no contention that producer-handlers are not paying the Class I price for milk purchased from pool plants. It was contended, however, that producer-handlers' costs for milk are lower than that for regulated handlers because all of them do not pay the premiums over Class I prices that many other handlers in the market pay. *Insofar as order prices are concerned, such costs are uniform.* It would be inappropriate to amend the order as proposed in order to eliminate the marketing situation complained of." (Emphasis supplied).

27 FR 10795, 10797